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# THE LAW OF COVENANTS.

*A TREATISE, explaining the Nature and  
Rules of the several Sorts of Covenants : As,*

Express.	Affirmative.
In Law.	Negative.
Disjunctive.	Mutual, or
Copulative.	Reciprocal.
Joint.	Personal.
Several.	Real.
Inherent.	Distinct.
Collateral.	Tantamount.

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*AND ALSO,*

The Construction of several special Covenants ;  
as, to save Harmless, Building Covenants, Mar-  
riage Covenants, &c. The Manner of Declaring  
and Assigning the Breaches ; and Pleadings un-  
der each proper Title.

*WITH*

Several other Matters relating to Covenants and  
Bonds of Performance.

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*By the Author of the Law of Ejectments.*

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c 12°  
*In the SAVOY:*

Printed by John Nutt, Assignee of Edw. Sayer Esq;  
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THE

# PREFACE.

SINCE the flourishing and trading Part of our Nation hath in this last Century so much encreased, by Reason whereof the Art of conveying and drawing Deeds and Instruments hath been exceedingly improved ; it is not to be wonder'd that Construction of Covenants, and Actions, and Pleadings, relating to that Title, bear so great a Figure in our Books of Reports : If we reflect on the Variety of Assurances, Contracts, Bargains, special Leases, Mortgages and Assignments, Marriage-

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Articles and Settlements, Deeds of Trust, Charterparties, and the like ; to the regular Drawing and apt Forming whereof, proper Covenants are respectively necessary ; we have good Reason to conceive, that a Treatise of this Nature may be very useful and acceptable, it never having been done before in such an entire Manner, or with such exact Method.

I have set forth the true Nature and distinct Notion of Covenant, as where it is a Condition and not a Covenant, and *e contra* ; and where it's in Nature of a Defeasance, where a Lease and not a Covenant, and where a Covenant amounts to a Lease : What Words will make a Covenant in Law, and the Extent and Operation thereof : And where a Recital shall amount to a Covenant

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venant or not : And where a *Proviso* sounds in Covenant, or is only a bare Condition.

I have also added several Rules, for Constructions of Covenants in reference to the Forms of Words and Sentences, together with the several Sorts of Covenants ; as Affirmative and Negative, Joint and Several, Real and Personal, and Reciprocal Covenants ; or where they are as a Condition Precedent. And what Covenants shall be said to be distinct or not.

I have likewise treated of special and particular Covenants, such as to save Harmless, seised in Fee, Authority to sell, &c. and to make Payments, for quiet Enjoyment, to permit or suffer, to free from Incumbrances, for further Assurance, and the like ; il-

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Illustrated with Variety of Modern Cases, with the Manner of Declaring and Pleading, rightly applied under each Title.

In the next Place, I have treated of Actions of Covenants; where Debt or Covenant lies at Election; who shall have the Action, and against whom it is properly to be brought; of Joinder in Action, and where the Action of Covenant shall be laid. I have also largely treated of Covenants brought by or against Assignees, and how and by what Covenants they are bound, or not; and what shall be a good Bar in Covenant; and what shall be said a good Performance of Covenant, and the nice Pleadings thereon; amongst several other Titles, Lastly, Of Bonds of Performance, and the accurate

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curate Diversity between Actions brought on Covenants, and Actions brought on Bonds of Performance of Covenants.

It is confessed, some of the Cases are repeated, but that was in some Measure unavoidable : First, because our latter Cases are more correct than the former like Cases, and in some, the Matter heretofore taken to be Law, is denied or altered ; but chiefly for that many Cases are divided into several Branches or resolved Points, and such resolved Points are as several distinct Cases, which ought to be referred under the proper Titles, otherwise the Treatise had been imperfect.

It's a singular Advantage, for the Understanding of the Law, to gain a good, tho' secret, Method ;

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for in Law, as in all other Arts and Sciences wisely handled, there is a secret Chain of Coherence, and one Part depends upon another, and facilitates the Construction of the whole, otherwise they are but meer Rhapsodies, and confused Jumbles.

**T H E**

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A T R E A -

# A TREATISE O F Covenants, &c.

## C H A P. I.

*The Nature of Covenant.*

**C**ovenant, in the Terms of the Law, is defined to be the Agreement or Consent of Two or more by Deed in Writing, sealed and delivered; whereby either of the said Parties doth Promise to the other, That something is done already, or shall be done hereafter. Now a Covenant is not a Duty, nor Cause of Action till it be broken, and therefore it is not discharged by a Release of all Actions: And when it is broken, the Action is not merely founded on the Specialty, as if it were a Duty, but favours of Trespass; and therefore

B

## The Law of Covenants.

an Accord is a good Plea to it, and it lies in Damages. *Allen* 38, 39. in *Eeles* and *Lam-beri's Case*.

**Custom of  
Bristol, Con-  
ventio ore tenus  
facta.**

**To be taken  
strictly.**

**Defeasance,  
and not a Co-  
ovenant.**

**Where a Co-  
ovenant termi-  
nates in it  
self, or to a  
present A&t,  
no Covenant  
properly.**

A Covenant properly is a Specialty, but by Custom *Conventio ore tenus facta*, is binding in *Bri-stol*, in *Wade* and *Bemboe's Case*. *Bemboe*, Plaintiff, declared in *Bristol* of a Covenant made by Word by the Testator of the Defendant with the Plaintiff in *Bristol*, and declared also within the said City: There is a Custom, that *Conven-tio ore tenus facta* shall bind the Covenantor as strongly as if it were made in Writing. *Per Cur'*, this Custom doth not warrant this Action, for the Covenant binds the Covenantor by Custom, but doth not extend to his Executors, but shall be taken strictly. *i Leon. 2.*

Where a Covenant terminates in it self, it is not properly a Covenant, but a Defeasance. *Plo.* 138. a. As a Covenant that the Demise shall be void, it shall determine the Lease, and it cannot enure to other Effect, for the Lessee cannot have an Action of Covenant upon this Covenant, for such Action does not lie; but where the Thing for which the Covenant is made, is to be done in Time after, *Raym.* 26. But in Action of Covenant, in nature of a Defeasance of a Recognizance, that upon Payment the Recognizance shall be delivered up to be vacated, and caused to be cancelled by the Defendant. This Covenant doth not terminate in it self, but is for a Collateral A&t, and engageth the Party to such A&t; and not only that it should be void. *i Keb.* 103, 118. *i Syd.* 48.

A Covenant to do a present A&t is not properly a Covenant, as a Covenant to stand seiz'd. *Raym.* 26. *i Syd.* 48. It is no Action properly, but Action on the Case. When

## The Law of Covenants.

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When a Covenant is to pay Money, it is a single Bill; but if it be to pay Money upon the Delivery of any Thing, Accord is a good Plea. 1 Keb. 155. *in Margine.*

Sometimes a Covenant is in Nature of a Condition Precedent, as *Brocas's Case*. 3 Leon. 219. Where the Lord of a Manor covenant-ed to assure the Freehold to one of his Copy-holders, and to his Heirs; and the Copy-holder, in Consideration of the same Cove-nant performed, promiseth to pay a certain Sum of Money: The Copyholder is not bound to pay the Money, unless the Lord first perform his Covenant; otherwise if the Covenant, on the Part of the Copy-holder, had been in Consideration of the Covenant to be performed. 2 Sand. 156. Cited in *Hunlock and Blacklow's Case*.

Covenant in  
nature of a  
Condition  
Precedent.

### *Covenant and not Warranty, or Warranty and not Covenant.*

A Feoffment by *Dedi & conceffii*, in Action against the Feoffor, does not warrant Action of Covenant on Eviction of the Inheritance, but it must be deduced in the real Lien by Warranty; but in case of a Freehold only, it is a Ground for Covenant. 1 K. 821. So *Prans Case*. But in *Relv. 139. Hob. 3.* If a Man makes a Deed by Feoffment with War-ranty, and an Estranger extends a Recogni-zance of the Feoffor on the Lands of the Feoffee, Covenant lies.

Per Coke *Cb. Justice*, in *Daniel and Wa-ters's Case*. *Brownlow 165.* Upon express Difference between a real Covenants, which extend to Freehold or Inheritance, as Warrant and Defend; a Man Lease and an Inheritance, as to Words of Waran-cannot have Action, unless he be ousted by one ty.

## The Law of Covenants.

one that hath Title. And a Man makes a Feoffment with Warranty, *non Feoffavit* is a good Plea; for if the Feoffment be avoided, the Warranty is also avoided, for that depends upon the Feoffment. But if a Man makes a Lease for Years, and covenants that he will warrant and defend the Land to the Lessee; if the Lessee be ousted by one that hath Title or without Title, he may have an Action of Covenant, for the Lessor hath the Evidences, and ought to defend the Possession of his Lessee, and the Right also, and Damages are only to be recovered: And this is the Difference between a Lease and Inheritance, though the Words of the Covenant be all one.

### *Covenant and not Case, Case and not Covenant.*

*A.* recovers Debt against *B.* and *B.* pays the Money to *A.* upon which *A.* releaseth all Actions and Executions to *B.* and by the same Deed promiseth to him to discharge the said Judgment, and not to sue Execution upon it, and after he sues Execution against him, he may have a Writ of Covenant upon this Deed, and not an Action on the Case. *M. 16 Jac. B.R. Reinish and Hildersfly.* Where the Words are Words of Defeasance, and in the Present Tense, and a present Thing to be done, Covenant lies not, but an Action on the Case. *1 Syd. 48. Robinson and Aunt's Case.*

In *B.R.C.J. Hales.* The Case was, *A.* covenants in a Lease, that *B.* shall have free Ingress, Egress and Regress, Way and Passage to and for himself, his Executors, Administrators and Assigns, and all Persons resorting there-

thereto from a Messuage, &c. to a Messuage, &c. and A. gives B. a Key to the Door which was in the Passage; it was rul'd upon a Trial that the Door must be left open, although it was used so to be shut at the Time of the Grant: The Covenant was not well Penn'd, it should have been at Times seasonable and convenient. This was in Action on the Case; and the Question was, If Action on the Case lies here, or rather Covenant? *Per Hale*, If an Interest pass (as in this Case it seems to do) and the Covenanter himself disturbs, Action on the Case lies.

### Covenant and Debt.

If a Man covenant with another to pay him 20*l.* at a Day, though he may have Action of Debt for the 20*l.* yet he may have an Action of Covenant at his Election. *Mic.*

*7 Jac. Strong and Wells.*

If A. grant a Rent to B. payable at a certain Feast Yearly, and covenants to pay the Rent at the Feast, Action of Cost lies for Non-payment, although he may have an Action of Debt for it. *Vid. Ibid.*

If A. acknowledge by his Deed to have sold to B. Ten Cords of Hop-Poles for 14*s.* per Cord, which he is to deliver to B. at his Garden, when B. shall send his Servant to Cord them. Qu. If a Man may have Action of Debt in the *Detinet*, to render Ten Cords of Hop-Poles upon this Deed, or be put to his Action of Covenant? *1 Rol. Abr. 606. Coachman and Horden.*

If in a Deed sealed and delivered by A. it be recited, Whereas by Obligation of such a Date that B. C. D. and E. stood bound in

## The Law of Covenants.

Covenant or  
Debt, by  
whom,

the Penal Sum of 160*l.* to the said *A.* for the Payment of 86*l.* 18*s.* at a certain Day; now this Writing testifies, That he, *viz.* the said *A.* suscepisset & promisisset to the said *B. C. D.* and *E.* in Consideration of the Sum of 40*l.* to the said *A.* paid by the said *B.* and *C.* in Part of the said 86*l.* 18*s.* with Interest and Costs, not to prosecute the said *B. C. D.* and *E.* or any of them, in any Action or Proces before such a Day, after the Date of this Writing, *Omnia quæ supra mentionata sunt per ipsum performata, & in defectione inde vel alicujus rei inde mentionatae per ipsum performari idem A. forisfaceret al' dit' B. & C. præd. summam 80*l.** If *A.* before the Day sue the said *B. C. D.* and *E.* upon the said recited Obligation, *B.* and *C.* only may have Action of Debt on this last Writing for the 80*l.* for this is a distinct Clause by it self, by which the said 80*l.* is limited to be forfeited to *B.* and *C.* only: So that it appears the Recompence shall be forfeited to them only, although the Promise by the first Part of the Deed was made to all Four; upon which they might have Action of Covenant, but none beside *B.* and *C.* may have Action of Debt. *1 Rol. Abr. 192. Harrison and Cheston.*

*F. N. B.* Debt lieth on any Covenant where the Sum is reducible to a Certainty. *2 Keb. 225. Birch and Weaver.*

It's agreed, That Debt lieth on any Covenant where the Sum is reducible to a Certainty, as on Covenant to pay so much a Hundred for Hops delivered. *1 Keb. 225. Birch and Weaver.*

## The Law of Covenants.

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Covenant, and not an Exception.

Lease for Years by Indenture, provided always, and it is agreed between the Parties, *Quod licitum foret & esset*, to the Lessor and his Heirs, at any and every Time, during the Term, to fell, cut down, and sell, all the Woods and Trees upon the Premisses, *Per Cur'*, It is not an Exception of the Trees, but only a Covenant ; and so an Action of Waste lies by the Plaintiff. Cr. El. 69o. *Lushford and Sanders's Case.*

Covenant and a Grant also.

Bond conditioned for Performance of Articles, by which the Defendant *concessit & agreeavit* with the Plaintiff, his Heirs and Assigns, *Quod licitum foret illis* at all Times to have and use a Way by and over the Close of the Defendant, in Consideration whereof, the Plaintiff *agreeavit* to pay the Defendant 20 s. 6 d. per Annum. This is a Grant of a Way, and not only a Covenant for the Enjoyment. 3 *Lewins 305. Holmes and Sellar.*

Not a Covenant nor a Condition, but a Declaration Explanatory.

Lease of a Farm except the Wood, Lessor covenanted with the Lessee that he shall take all manner of Underwood, provided always, and the Lessee covenants he will not cut any manner of Timber Trees : This adjudged no Condition, but an Explanation with what Wood he should meddle, though in Truth it was of another Thing than was comprised in the Covenant before ; as if I am seized of the Manor of D. in D. and

## The Law of Covenants.

of Black-Acre in D. and so seized. I covenant with J. S. that he shall enjoy the Manor for Ten Years, provided and the said J. S. covenants that he shall not enjoy Black-Acre. This Covenant is not a Condition, but a Declaration deduced out of my Covenant, to make a plain Declaration that it is not my Interest that Black-Acre shall pass, be it Parcel or not of the said Manor. *Pop. 117 & 119.*

### *Covenant quasi a Defeasance.*

Debt on single Bill of 68*l.* with Covenant to pay it when such Bills be stated, and appear due for the Costs of the Defendant Testator, and produced to Two Attorneys, &c. indifferently to be chosen between them, &c. the Covenant being in the same Deed, it works as a Defeasance or Acquittance, not as a distinct Deed, &c. *1 Keb. 624. Holdy and Orway.*

### *Lease or Rent, and not a Covenant.*

If A. lets Land to B. by Indenture, and the Words are, *in Consideration of the Payment of the Rent hereafter mentioned*, he leaseth, &c. and after, in the same Indenture, B. covenants for him and his Assigns with A. and his Assigns, to pay 10*l.* at certain Feasts Yearly, &c. This shall be a Rent, and not a Sum in gross, for upon the whole Indenture, this shall be a Reservation, and not a Covenant; for the Words [*in Consideration of the Rent hereafter mentioned*] make it clear. *2 Rol. Ab. 449. Athowre and Heming.*

Reservation,  
and not a Co-  
venant.

By

## The Law of Covenants.

By Articles the Testator covenants and agrees with the Defendant that he shall have and enjoy such an House and Land for 6 Years, and in consideratione *Premissorum* the Defendant covenants and agrees to pay to the Testator, his Heirs, Executors and Assigns, an Annual Rent of 9*l.* during the said 6 Years, at the Feast of the Annunciation, and St. Michael. Defendant enters, Testator dies, Rent is arrear; if it be a Covenant it is due to the Executor, if it be a Reservation it follows the Reversion, and so goes to the Heir. *Per Cur'*, This is meerly a Rent, and not a Covenant, and the Words [*covenant and grant that he shall enjoy*] amount to a Lease, and is not a Sum in gross, and he covenants to pay to him and his Heirs. *Cro. Car. 207. Drake and Mon-* 2 Bulst. 281.  
*day, & Owen 151. Alfo and Dennis's Case.*

A Prior leases a Rectory, rendering 4*l.* per Annum, and by the same Indenture grants to the Lessee and his Assigns, *dare & reddere*, Covenant, and  
not a Rent. Yearly 3*s. 4 d.* for Portage, the Rent reserved is 4*l.* and though 3*s. 4 d.* is to be paid to the Lessee for Portage, yet this is not any parts of the principal Rent to be retained by way of Defalcation, and by way of Covenant the Lessee is to receive 3*s. 4 d.* *Yolv. 42. Chambers and Mason's Case.*

*Thomas Seley*, feized of Copyhold Lands for Life, did execute a Deed to *Peter Seley*, as a collateral Security to indemnify him for the Payment of 100*l.* by which Deed, after a Recital of the Counterbond given to *Peter*, and the Estate which *Thomas Seley* had in the Lands, he did covenant, grant and agree for himself, his Executors, Administrators and Assigns, with the said *P.* that he, his Executors and Administrators, should hold these

Lease, and not these Lands from the Time of making the said Deed for 7 Years, and so from the End of 7 Years to 7 Years, for and during the Term of 49 Years, if *Thomas* should so long live. The Court seemed inclined that it's a Lease, and so a Forfeiture, there being no Custom to warrant it. It is a Rule, *That the Word [Covenant] will make a Lease, though the Word [Grant] be omitted*; nay, a Licence to hold Land for a Time without either of these Words, will amount to a Lease, much more when the Words are, To have, hold and enjoy, the Lands for a Term certain: As *Hob. 35. Tisdale and Essex. 2 Cro. 92, 398. 1 Rol. Abr. 847. Cro. Car. 207.* And it is now settled, that an Action of Debt may be brought upon such a Covenant; but it was smartly argued on the other Side. If the construing of it to be a Lease will work a Wrong, then it's only a Covenant and an Agreement, and no Interest will vest; and therefore it shall not be intended a Lease in this Case of a Copyhold, for if it should, there would be a Wrong done to the Lessor and Lessee; for it would be a Forfeiture of the Estate in the one, and a defeating of the Security of the other; but no Judgment was given. *2 Mod. 80. Richards and Seley. 3 Keb. 638. Mesme Case.*

Rent, and not  
a Sum in  
gross.

Articles of Agreement indented and sealed between *A.* and *B.* the Words are, *It is covenanted and agreed, That A. doth lett such Land to B. for 5 Years from Michaelmas next, provided that the Lessee shall pay therefore at Michaelmas and Lady-Day 100 l. by equal Portions;* in as much as the first Words are a present Lease, the Proviso shall make a present Reservation of the Recovery, and not a Sum in gross. *2 Rol. Abr. 449. Vide plus infra.*

Cove-

## Covenant, and not a Solvendum.

Plaintiff brings Debt on Bond against the Defendant, wherein the Defendant did acknowledge himself to be indebted to the Plaintiff in 40*l.* which he did thereby covenant to pay, when such a Bill of Costs should be stated by Two Attorneys indifferently to be chosen between them ; and sets forth in his Declaration, That he named one Attorney, and desired the Defendant to name another, which he refuseth to do, and so intitles himself to the Action. *Per Cur'*, This is a Covenant, and not a *Solvendum*, for else it will be in the Defendant's Power never to pay the Money, and the Plaintiff, having named an Attorney, ought to Recover. 2 *Mod.* 266. Sir *J. Otway* and *Hollipps.*

## Covenant, and not Account.

Covenant upon a Writing sealed, by which the Defendant's Testator acknowledgeth himself to be accountable to the Plaintiff for all such Moneys which shall be charged by him upon *A.* to be paid to *B.* and faith he charged so much upon *A.* to be paid to *B.* and that he had not paid it ; wherefore he brought this Action against the Defendant, his Executors : *Per Cur'*, Covenant well lies upon such Words in a Deed, though, Cr. *Geary* and *Raison* was cited to the contrary. *Covenant will lie upon any Words in a Deed, purporting an Agreement for Payment of Money.* 1 *Lewins* 47. *Brice versus Carr.* Vide this Case, 1 *Keb.* 155. *Et per Cur'*, There is no

## The Law of Covenants.

no other Remedy against Executors; and had it been against the Party himself, such Agreement being by one Person to pay Money charged upon J. S. for which an Account lieth not, he being not chargeable as Receiver or Baily, the only Remedy is by Covenant, and it's not like *Green and Reson's Case*, 1 Cro. 128. No Notice is given by the Plaintiff to *Dixen*; who, upon such Bill, was to pay to Sir *Thomas Viner*, which *per Cur.* is not necessary. *Vide 1 Keb. 155.*

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### C H A P. II.

*What Words will create or amount to an express Covenant, or not.*

**Yielding and Paying.** **T**HE Words, *Yielding and Paying*, makes an express Covenant, and not a Covenant in Law only; as if a Man let Land for Years, reserving a Rent, Action of Covenant lies for Non-Payment of the Rent, for *reddendo*, the Rent is an Agreement for the Payment of the Rent, which will make a Covenant, 1 *Ventr.* 10. 1 *Rol. Abr.* 519. *Pl. 10.*

**The Lessee shall repair.** These Words in an Indenture of Lease, [*and the Lessee shall repair the Mills*] being the Thing leased, as oft as Need shall require, and shall leave them sufficiently repaired at the End of the Term, make a Covenant, for it is the clear Agreement of the Parties, and otherwise the Words [*shall leave, &c.*] will not have any Effect, and because of the last Words it cannot be a Condition, *Brett and Cumberland*; and being by Indenture, it is

is the Words of both Parties. *Pop. 136. 2 Cra.*

399.

If Lessee for Years covenant to repair, &c. provided always, and it is agreed, that the Lessor shall find great Timber: This makes a Covenant on the Part of the Lessor to find great Timber, by the Word [agreed,] and shall not be a Qualification of the Covenant of the Lessee: But if the Lessee covenant to <sup>1 *Levin. 274.*</sup> Repair, provided always that the Lessor <sup>*Raym. 183.*</sup> shall find great Timber without the Word [agreed;] this Proviso shall not be any Covenant on the Part of the Lessor, but shall only be a Qualification of the Covenant of the Lessee. *1 Rol. Abr. 518. Holder and Taylor's Case.* In the Indenture of Apprentice, That Apprentice shall be Loyal, & *Secreta sua velaret*; these Words imply a Covenant. *More 135. Stanton's Case.*

If there are Articles of Agreement between A. and B. by which it is agreed (upon a Marriage intended between A. and C.) that all the Stock of C. shall remain in the Hands of B. until A. shall make a certain Jointure to C. *ipso B. Annuatim solvendo to A. interesse proinde secundum ratam 8 l. per Cent. &c.* If B. does not pay the said Interest, an Action of Covenant lies against him upon these Words; for that every Agreement by Deed is a Covenant, and otherwise A. shall not have any Remedy for the Money. *8 Car. B. R. Croft and Norbury, 1 Rol. Abr. 518. Pl. 6.*

If a Man convey Land to another in Fee with Warranty, and after the Land is evicted by eigne Title for certain Years, the Grantee of the Land may have Action of Covenant upon the said Words against the Grantor upon this Eviction, although the Warranty be

Covenant or  
Warranty ac-  
cording as the  
Eviction is.

an-

## The Law of Covenants.

annexed to the Freehold, for the said Words make a Covenant if a Chattel be evicted, and a Warranty if a Freehold be demanded.

**I Rol. Rep. 25. Rudg and Pruchcomb.**

This Case is more intelligibly reported in *Hob. 3. Tel. 139.*

It is agreed, that there is no need of the Word Covenant to make a Covenant, *but any Thing under the Hand and Seal of the Parties, which import an Agreement, will amount to a Covenant.* **I Rol. Abr. 518.** These Words

**Words of A. in a Lease for Years, That the Lessee shall Repair, make a Covenant.** So in the Case of Indentures of Apprentiship, there are not the formal Words of a Covenant, but only an Agreement, That the Master shall do this, and the Apprentice shall do that; these are Covenants, but in all these Cases there is something of an Undertaking. **So Rol. 519. Walker's Case.** If a Deed be made to another

**Words in the Future Tense.** in these Words, *viz.* I have a Writing in my Custody, in which *W.* standeth bound to *B.* in 100*l.* and I will be ready to produce it: This is a Covenant, for this is a present engaging to do it.

*A.* made a Bill of Debt against *B.* for the Payment of 20*l.* at 4 Days, and in the end of the Deed covenanted and granted with *B.* his Executors and Administrators, That if he made Default in any of the said Payments, that then he will pay the Residue that then shall be unpaid; and afterwards *A.* fails in the first Payment, and before the second Day *B.* brought Action of Debt for the whole 20*l.* It was moved, if *B.* will sue *A.* before the last Day, it ought to be by Way of Covenant, and not by Debt. But *per Cur.* the Action lies; for if one covenant to pay me 100*l.*

such a Day, Action of Debt lies *a fortiori*, when the Words of the Deed are Covenant and Grant; for the Word Covenant sometimes finds in Covenant, sometimes in Contract, *secundam subjectam materiam*. *1 Leon.* 8.

The Word  
Covenant  
sometimes  
finds in Co-  
venant, some-  
times in Con-  
tract.

Bond to pay  
40 l. when an  
Account shall  
be stated, it is  
a Covenant.

The Testator was indebted to the Plaintiff by Bond, which he did thereby covenant to pay, when such a Bill of Costs should be stated by Two Attorneys indifferently to be chosen between them; and sets forth in his Declaration, That he named one Attorney, and desired the Defendant's Executor to name another; which he refused, and so brings Action of Covenant. This is a Covenant, and not a *Solvend'*; and if it should not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor, whether ever it shall be payable; and the Plaintiff, having named an Attorney, ought to cover. *2 Mod. 266.* Sir John Orway versus Oldipps Executor, &c. I am content to give W. 10 l. at Michaelmas, and 10 l. at Lady-day, Action of Covenant lies upon it as well as Debt. *3 Leon. 119.*

In Covenant on a Feoffment and Grant of Bishops Lands, Breach was assigned, That the Defendant had no good Title, and Demurrer thereon; the Court conceives that this will not make any express Covenant, but *dedi* will, and so *reservando*. *3 Keb. 549.*  
*Browning's Case.*

Covenant doth not lie against Executors of Tenants in Tail, upon these Words, *De-  
mise and Grant*. *1 Anderson,* p. 12. Upon the Words [Demise and Grant] without any other Words, which comprehend Warranty in them, this Action well lies, and a Lease by

Demise and  
Grant.

## The Law of Covenants.

by Estoppel is a good Lease to ground this Action upon Eviction; and to traverse that he was not possess'd by vertue of a Lease, is no Plea against the Lease by Indenture, which is an Estoppel, without shewing a particular Cause. *Cro. Jac. 73. Stiles and Hering.*

If the Lord grant to his Tenant, that he will not distrain him in such a Part of his Land for his Rent, this shall be taken to be a good Covenant, by this Word [Grant.] *Perk. Sect. 69.*

If a Man make a Lease for Years, and warrant it to the Lessee, his Heirs and Assigns, though this be not a Warranty, yet it's a good Covenant in Law. *Br. Cov. 38.*

Though the Words *Vendidit assignavit & trans-tulit*, does not amount to a Covenant against an eigne Title, yet against the Covenantor it will amount to a Covenant. *3 Keb. 304. Deering cont' Farrington.*

A Lease for Years made to *A.* determinable upon the Lives of *B. C.* and *D.* *B.* dies, *A.* assigns to *E.* and *E.* reciting the Death of *B.* and the Assignment to him, assigns the Term to *E.* and covenants with him, That he himself is lawfully possess'd of all the Premisses of a good and sufficient Estate for the Residue of the said Term, if the said *C. D.* or either of them, shall happen so long to live, and they the said *C.* and *D.* are yet in full Life, though the Words are not, (and that) the said *C.* and *D.* are yet in full Life; yet this is implied by the Words, and is as a several Covenant, or otherwise the last Part would be void and of none Effect. The Breach was, *That C. was dead at the Time of the Assignment.* *2 Rol. Abr. 249. Pl. 2.*

Where Recital amounts to a Covenant.

Covenant on Demise of a Coal-Mine, whereby it's recited, That before sealing of the Indenture, it was agreed the Plaintiff should have the 3d Part digged, &c. On Demurrer to the Declaration it was excepted, That here is no Covenant to pay the 3d Part, but a Recital of an Agreement to have it. But by Recital, That Hales, were it but a Recital, that before the it is agreed. Indenture they were agreed, it is a Covenant; and so to say, Whereas it was agreed to pay 20 l. for now the Indenture it self confirms the Agreement, and Intent Precedent, tho' it be relative to the former Act in Païs, when it's declared by Deed, it is now a Covenant by the Indenture. 3 Keb. 465. Barfoot and Picard.

Defendant covenanted by Articles, reciting, A Covenant that doth not consist with the Recital, that leads and occasions it, shall not oblige, &c.

That a Marriage was intended between the Defendant and one *Rebecca*, Widow, who had seven Sons; the Defendant covenanted in the said Articles, having recited, That R. M. deceased, Father of the said seven Brothers, had by his Will bequeathed, *cui libet ipsorum praed' Joseph' Jacob, &c.* (only leaving out *Nathaniel*) the Sum of 50 l. a-piece; covenants with the Plaintiff to pay to the said seven Sons, naming *Nathaniel, praed' separales Legationes, vel Sum' 50 l.* and the Defendant pleads further, he paid to the six Sons 50 l. a-piece, and sheweth Performance of the other Articles: Plaintiff demurs, because he shews not he paid 50 l. to *Nathaniel*, and he did expressly covenant to pay the said *Nathaniel*, and the rest, the said several Legacies or Sums of 50 l. *Per Cur'*, in the Recital of the said Will, nothing is mentioned to have been bequeathed to *Nathaniel*.

## The Law of Covenants.

*nathaniel* as well as the rest, though he covenants to pay to *Nathaniel* as well as the rest, yet it is *Legationes, summas præd'*, and there being no Legacy to *Nathaniel*, and that appearing by the Recital of the Will, his Covenant shall not oblige the Defendant to pay him any Thing. 2 Ventr. 140. *George and Butcher.*

A. by his Deed Poll recited, That he was possessed of certain Lands for Years of a certain Term, by good and lawful Conveyance he assigned the same to J. S. with divers Covenants, Articles and Agreements, in the said Deed contained, which are or ought to be performed on his Part: The *Qu'* was, If the Recital be an Article or Agreement within the Meaning of the Condition of the Bond for Performance. *Per Gaudy*, it is an Agreement, every Thing contained in the Deed is an Agreement, and not only that which I am bound to perform. It was moved, If that Recital be within these Words of the Condition, [*which are or ought to be performed on my Part?*] And some were of Opinion, it is not within those Words, for that extends only in *futurum*; but this Recital is of a Thing past, or at least present. *Clench*; Recital of it self is nothing, but being joined and considered with the rest of the Deed, it is material as here, for against this Recital he cannot say that he hath not any Thing in the Term, and it was clearly resolved, That if the Party had not that Interest by a good and lawful Conveyance, the Obligation was forfeited. 1 Leon. 122. *Severn and Clerk.*

Recital being  
considered  
with the rest  
of the Deed,  
is material.

In *Babington* and *Allen's Case*, these Words [paying the Rent] is no Condition Precedent, but rather *Concomitant*, and is the Consideration whereupon the Party is to do the Act, and is liable to Construction as the Subject Matter is, the Word [paying] and without Construction (unless as in the Case of *Dier* 371, it be Precedent) doth not import a Condition; but clearly here it can be no Condition, being an usual Clause at the End of all Leases. 2 *Keb.* 9. 23.

## C H A P. III.

*What Words amount to a Covenant, and not to a Condition; or to a Condition, and not to a Covenant.*

Essee brought Covenant, and declared, That the Lessor covenanted with him, that he paying the Rent, and performing the Covenants on his Part to be performed, shall quietly enjoy; the Breach assigned was Disturbance by the Lessor. Lessor pleads, the Plaintiff did enjoy quietly till such a time; but then he cut Wood down, which was contrary to his Covenant, and then he entered. The Qu' was, Whether the Defendant's Covenant was Conditional or not? For if it amount to a Condition, then the Lessor's Entry is lawful; but if it be a Covenant, he ought to bring his Action. *Per Cur'*, the Covenant is not Conditional, for the Word, Paying and Performing, signify no more than that he shall enjoy under the Rents and Covenants. Indeed, the Word

## The Law of Covenants.

Where the Word Paying amounts to a Condition, and where not.

[Paying] may in some Cases amount to a Condition ; but that is, where without such Construction the Party can have no Remedy.

2 Mod. 35. Vaughan 32. 1 Sid. 266, 280.

Lessor covenants, That the Lessee, paying his Rent, shall enjoy the Land demised during the whole Term the Lessee did not pay the Rent, and after is ejected by a Title Paramount, by Two Judges against One : The Covenant is Conditional, and the Lessee shall not have Advantage of it, if he did not perform the Condition which is created by this Word [Paying]. 4 Leon. p. 50.

A Man lets Land by Indenture, and in it is such a Clause, and it is covenanted (or agreed) between the said Parties, that the Lessee shall not do such a Thing upon Pain of forfeiting his Estate. It is a Condition, for the Words being indifferent whether of the Lessee or Lessor, they shall be taken for the Words of the Lessor. 1 Rol. Abr. 407, 408.

Sir Thomas Jones. p. 206. in Warren and Arthur's Case. One covenants that the Plaintiff shall quietly enjoy the Land demised, paying the Rent reserved : And there it was pleaded, That the Plaintiff had not paid the Rent according to the Reservation and Demur upon this ; but it was adjudged there, that the Word [Paying] doth not make the Covenant Conditional, but that it was a Reciprocal Covenant, for which the Party may have his Action. This Case is reported, 2 Mod. 34. The Case there was, The Breach assigned was a Disturbance by the Lessor ; Defendant pleads, that till such a Time the Plaintiff did quietly enjoy ; but that then he cut down Wood, which was contrary to his Covenant, where

whereupon he entered. Now if this Defendant's Covenant amount to a Condition, then this Entry is lawful. *Per Cur'*, It amounts to a Covenant only, and makes not a Condition; nor was it ever known, that by these Words the Lessor entered for Non-payment of Rent.

One made a Lease for Years, Lessor covenanted that the Lessee should have Houseboot, Hayboot and Plowboot, without committing any Waste, *upon Pain of Forfeiture of the Lease*. The Covenant is no more than what the Law appoints, and therefore vain; and it's a Covenant on the Part of the Lessor, and so cannot be a Condition. *Cro. Eliz. 604. Archdeacon versus Jernor.*

A Covenant  
on the Part of  
the Lessor,  
and not a Con-  
dition.

*A.* makes a Lease of Lands to *B.* for 10 Years, rendring Rent, and *B.* covenants to Repair; afterwards *A.* by his Will deviseth, That *B.* shall have the Lands for 30 Years, after the 10 Years, under the like Covenants as are comprised in the Lease: This makes it to be Conditions in the Second Lease what were Covenants in the first, for they cannot be Covenants for want of a Deed; and if they should not be Conditions, the Heir of the Lessor were without Remedy, if they are not performed. *Godb. 98, 99. 2 Leon. Pl. 40.*

Covenants in  
a first Lease,  
and Condi-  
tions in a se-  
cond.

#### Coven 54. Machele and Dunton.

Lessee covenants by the same Indenture of Lease, that he will not alien nor assign his Term to any other but to his Wife for Life, and the Residue of the Term to his Children, or one of his youngest Brothers, upon Pain of forfeiture of his Lease; the Lessee assigns it to his Brother, having a Wife. This Covenant is a Condition to defeat the Estate; for being by Indenture, they are the Words of both Parties, and are sufficient to deter-

Where a Co-  
venant is a  
Condition to  
defeat the  
Estate.

## The Law of Covenants.

mine the Lease. Cr. fac. 389. *Whichcoat and Fox.* 2 *Bulst.* 290.

Recoverors to an Use, before the Statute 27 H. 8. make a Lease for 99 Years by Indenture, at 10 l. Rent; Lessee by the same Indenture covenanted, That he will pay the Rent to *Cestuy que Use*, his Heirs and Assigns, *proviso semper*, if the said *Cestuy que Use* doth not make his Heir-Male his Assignee, that then he shall pay the Rent to the Recoverors, their Heirs and Assigns; afterwards *Cestuy que Use* dieth, and doth not make his Heir-Male his Assignee, Lessee doth not pay the Rent to the Recoverors. The Qu' was, If this Estate were forfeited, and that this Proviso makes his Estate Conditional? *Per Cur'*, Its no Condition that went to the Estate, but only abridged the Covenant. *Cro. Eliz. 73. Scot's Case. 2 Leon. 128.*

In Trespass, Defendant justifies, for that *M.* seized of Lands let them to the Plaintiff except the Trees and Liberty of Eradicating, & asport' cum averiis reparand' sepes & implend' foveas, and *M.* grants the Trees and the Liberty to *A* and he and the other Defendants, as his Servants, use this Liberty, which is specially pleaded, *que est ead' Fractio.* Plaintiff demurs, and for Cause shews, that

*Covenant, and not a Condition.* the Defendants have not alledged that they have filled the Ditches, and amended the Hedges, according to the Agreement. *Pollefen* for the Plaintiff shewed, that this is a Condition, and not being performed, destroys the Agreement, and avoids the Liberty. But *per Cur'*, This is not a Condition, but a Covenant, for which the Lessee hath Remedy by Action. It was objected, That the Power and Liberty was annexed to the Re-

Reversion, which is not granted to *A. sed non alloc'*, for the Liberty is annexed to the Trees, and incident to them, and assignable with them. Sir Tho. Jones 205. Warren and after alias Arthur.

A Proviso, coupled with other Words of Covenant and Grant, shall not create a Condition, but be of the same Nature as other Words of Grant, as, *Proviso semper*, and the said *A. B.* covenants and grants to and with, &c. That the said Earl of Huntington, and Lord Mountjoy, may dig or Oar. 4 Leon. 147. Moor 174.

Debt on Bond, for Performance of Articles; the Plaintiff covenanted with the Defendant to assign over his Trade to him, and that he should not endeavour to take away any of his Customers; and Consideration of the Performance of this Covenant, the Defendant covenanted to pay the Plaintiff 60*l. per Annum* during his Life. These Words, *in Consideratione Performanceis*, make it a Condition Precedent, which must be averred. 3 Leon. 219. Per Cur'. *præter Twisden*. Twisden, How long must he stay till he be entitled to his Annuity? As long as he lives? For this Covenant may be broken at any Time. *Maledicta expositio*. 1 Mod. 64. Humlock and Blacklow. Et 2 Sand. 155. 2 Keeble 674. Better report. ed by Sanders.

Lord Cromwell's Case, the Words, *covenanted, provided and agreed*, give an Advantage of a Condition, or a Covenant.

Pluiss, where [Provided] amounts to a Condition,  
or a Covenant.

Grant by the Earl of Pembroke of the Lieutenancy or Deputyship of the West Part of the Forrest of Selwood, to Sir Maurice Berkley, and the Heirs Males of his Body : Provided always, and the said Sir Maurice covenanted and granted, &c. with the said Earl, his, &c. That it shall be lawful for the said Earl, his Heirs and Assigns, to have all the Preeminence and Commandment of the said Game and Hunting there, as if the Grant had not been made. Provided also, and the said Sir Maurice covenanted for, &c. to and with the said Earl, his, &c. That the said Sir Maurice, and the Heirs Males of this Body, would preserve the Game as it hath been used, and that they should not cut any Wood, &c. Sir Henry Berkley, Son of Sir Maurice, cut down Four Timber Trees. Qu. was, If this were a Condition, and so gave Entry to the Earl on a Covenant ?

*Per Cur'*, The first Proviso is not a Condition but a Covenant, either because by this he is not to do more than he may do by his superior Custody, in which Case he ought to do it by his own Authority ; or if it be taken that he may kill the Game at his Pleasure, it is void, because against his Office.

2. The second Proviso is but a bare Covenant, it shall be entirely the Words of the Grantee himself as the Covenant is, and without the Words of the Grantor a Condition cannot be. And therefore, suppose it had been on the other Part, provided always, and the Grantor covenants that the Grantee shall have

Where Pro-  
viso is a bare  
Covenant,  
and why.

have the Refuse of the Browse, &c. This is a This Case  
meier Covenant, Popb. 116. Earl of Pembroke otherwise re-  
ver. Sir Henry Berkley, a Case there put by ported by  
Serjeant Rendlow, was this:

Provided always, and it was covenanted, granted and agreed between the Parties, If the Lessee sell or alien the Term, that the Lessor shall have the Preferment. This they agreed to be a good Condition, because they are the Words as well of the Lessor as of the Lessee. But the Case of *Harrington and Pepull*, 17 Eliz. B. R. Pepull made a Lease for Years to *Harrington* of a Farm, except the Wood, and covenanted with the Lessee, that he shall take all manner of Underwood. Provided always, and the Lessee covenants, that he will not cut any manner of Timber-Trees, and it was adjudged no Condition, Popb. ibid.

117.

If there are Articles of Agreement made by Indenture between A. and B. by which A. agrees that B. shall have an House in a Street in London for certain Years, provided and upon Condition that B. shall receive and pay the Rents of the other Houses in the same Street of A. mentioned in a Schedule. And it is further agreed, that B. for his Labour in collecting the said Rent, shall have the Overplus of the Rents beyond such a Sum. This is not any Covenant on the Part of B. to bind him to receive and pay the Rents mentioned in the Schedule; but the Proviso will make the Estate of B. void in the House (this being a Lease, and will not make a Co-  
yenant). M. 4 Car. 1. B. R. Geary and Rea-  
son, Cr. Car. 128. yet see 1 Levinz 47. Price  
ver. Carr, & al.

If

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If A. make a Deed to B. in these Words :  
*I have in my Custody one Writing Obligatory, in which Writing Obligatory one William now standeth bound to the said B. for the Payment of 400l. such a Day, being the proper Money of B. and I will be ready at all Times when I shall be required to deliver the same Writing Obligatory to the said B.* If B. after demands the Obligation of the said A. and he refuseth to deliver it, B. may have an Action of Covenant upon this Deed, by force of these Words, [and I will be ready at all Times when I shall be required to redeliver the same,] *ii Car. B. R. Walker's Case.*

[I will be ready at all Times to deliver] amount to a Covenant.

Proviso,  
where it makes not a Lease, only a Covenant.

Covenant, on what Words.

Where the Word Covenant will make a Lease.

If A. let to B. for Life, with a Proviso, That if the Lessee dies within the Term of Forty Years, that then the Executors of the Lessee shall have it for so many of the Years which shall amount to the Number of Forty Years, to be accounted from the Date of the Indenture of Lease. This Proviso shall not make a Lease, but only a Covenant, *Dier 150. 1 Rep. 155. Rector of Chedington's Case.*

Action of Covenant was brought upon these Words, (*viz.*) *I oblige my self to pay so much Money at such a Day, and so much at such a Day.* *Per Cur'*, Action of Covenant lies, especially if both Days are not pass'd; but the Chief Baron Bridgeman doubted, how the Law would have been if the Words were, *Teneri & firmiter obligari*, for that those Words found in Debt and not in Covenant. And *per Cur'*, the Words, *quod teneat Conventionem, and de Conventione fracta*, are all one, *Hardr. 178. Norris's Case.*

It hath been a general Rule, *That the Word Covenant will make a Lease, tho' the Word Grant be omitted;* much more when the Words are,

To

## The Law of Covenants.

27

To Hold, Enjoy, &c. 2 Mod. Rep. 80. But if one covenant to grant and suffer one to enjoy such Lands, this will not amount to a Condition, for the Intent of the Parties is only to make it a Covenant.

Bishop of Rochester let Lands to the Defendant. Plaintiff replies, That the said Lease was upon Condition, (*viz.*) the Lessee by the Indenture of the said Lease did covenant, that he would not put out nor disturb any of the Tenants inhabiting within the said Mannor out of their Teneiments, doing their Duties according to the Custom of the said Mannor, and shewed the Defendant had put out one A. G. a Tenant, &c. and that the Bishop had recenter'd for the Condition broken. *Per Cur'*, it is a Condition, tho' the Words sound in Covenant, and be the Words of the Lessee, yet the Lease being made by Indenture, the same is the Deed of both, and every Word in it is spoken by both Parties; and tho' he may have Action of Covenant, yet he cannot thereby overthrow the Lease as by Entry for Condition broken, and yet by the Words it seems that the Meaning of the Indenture was, that by the Breach of this Covenant the Estate should be defeated. So 24 Eliz. *Hill and Lockham*: By Indenture the Lessee covenanted to grind all his Corn at the Lessor's Mill, and in the End of the Indenture Lessee covenanted to perform all Covenants *sub pena foris facturæ*, and by the Opinion of the whole Court the same was a Condition; but in the principal Case the Breach was not well assigned. It is said, he had put out a Woman, *unam Tenentem*, &c. and perhaps she was but Tenant at Will, and the Covenant refers only to Copyholders, and perhaps she had

Covenant not  
to disturb  
any Tenant  
of the Man-  
nor out of  
their Tene-  
ments doing  
their Duties.

## The Law of Covenants.

had disseised one of the Tenants, and then the putting her out is no Breach; it's said she had done her Duty that might be once, he ought to have said she had done her Duty always, and the Exceptions were incurable, *1 Leon. p. 245. Thomas and Ward.*

The Parson of D. covenanted with one of his Parishioners, that he should pay no Tythes, for which the Parishioner covenanted to pay to the Parson an Annual Sum of Money, and afterwards the Tythe not being paid, the Parson sued him in the Court Christian, and the other prayed a Prohibition. *Per Cur'*, It's a bare Covenant and no Interest of the Tythes pass, but it's a bare Covenant, and the Party who is sued for Tythes has no Remedy but by Action of Covenant, *Popb. 140. Fulcher and Guffin.*

### Clapham and Moyle's Case.

On Marriage agreed on between the Defendant and one *Mary F.* 1500*l.* was to be paid by Articles at several Days to the Plaintiff, and he to convey several Lands and an Office to the Defendant, Proviso that the Defendant out of the first Three Years Profits should pay 500*l.* to the Plaintiff. Plaintiff brings Debt on this Proviso, averring Profits above the Value received, and that the Marriage took Effect. Defendant demurs, because this Proviso is in Nature of a Defeasance or Condition. *Per Cur'*, this Proviso can never have any Effect as a Condition, *Moyle* was to surrender to bring the other in, but could not re-enjoy it on Breach of Condition. There are no Words that refer or direct to any Proviso to be in the future Grant, nor would the Matter bear it, being an Office of Justice, and

**Where a Proviso can have no Effect as a Condition, but is by Way of Agreement.**

and therefore could not be reduced on Breach of the Condition; it must be construed by Agreement of the Parties to be a Covenant, *1 Keb. 842, 860, 892.* This Proviso is not by Way of Defeasance, but Agreement, *1 Lev. 155: Per tot Cur'*, it amount but to a Covenant by Articles. It is covenanted and agreed between the Parties, that *J. H.* doth let the the said Lands for and during Five Years, to begin, &c. Provided always [the said Defendant] shall pay to the Plaintiff yearly, at such Feast-Days by equal Portions, &c. during the Term. And the said Parties agree that a Lease shall be made pursuant. *Per Cur'*, This is an immediate Lease, because of the Words [he doth let.] 2. This Proviso is a good Reservation of the Rent, it being by Articles whereunto either of them were Parties: *Per Popbam*, it's a Reservation and a Condition also. *Proviso* joined with the Words of Covenant, make it a Condition and a Covenant also, *Cr. Eliz. 486. Harrington and Wise*, as in *Moo. 859. and Noy. 57. Mesme Case.*

If a Man by Indenture lets Lands for Years, provided always, and it is covenanted and agreed between the said Parties, that the Lessee should not alien, and it was adjudged that this was a Condition by Force of the Proviso, and a Covenant by Force of the other Words, *1 Inst. 203. b.*

Action of Covenant on *Concessi & Feoffavi*, in a Conveyance of an Inheritance, and Breach assigned in Entry on the Plaintiff. Defendant demurs. The Qu. was, Whether *Concessi* make a Warranty or Covenant in Case of Inheritance, as it doth on a Term? The Court inclined it would not, *Hob. 3 Keb. 188.*

## C H A P. IV.

*What shall be said an Agreement, and what Agreement amounts to a Covenant.*

Entry into  
Land except-  
ed, no Breach.

**I**F a Man let a Mannor by Indenture, except a certain Parcel of Land, and the Lessee enters into Bond to perform all the Covenants, Articles and Agreements contained in the Indenture, and after the Lessee enters into the Land excepted; yet this is not any Breach of the Condition, for the Land excepted is not leased, and is as if it had not been named, and therefore cannot be intended an Agreement to be performed on the Part of the Lessee within the Intent of the Indenture, *1 Rolls Abr. 431. Russell and Gullnoll.*

Earnest Part  
of the Sum.

Where Anti-  
quity has a  
mutual Re-  
medy.

On Oyer, the Specialty was, *ff. 11 May 1668.*  
*It is agreed upon by Dr. J. P. and B. C. Esq; That the said B. C. shall give to the said Dr. 500 l. for such Land and House, and the Brewing-Vessels. In Witness whereof, we do put our Hands and Seals, mutually given as Earnest, in Performance of this, 5 s. the Money to be paid a Week after Midsummer, 1668.* Per Cur', the Earnest shall be intended as Part of the Sum, and the Action is well brought without Averment of the Conveyance of the Land, for it shall be intended that both Parties had sealed the Specialty, and if the Plaintiff hath not conveyed the Land to the Defendant, he hath also an Action of Covenant against the Plaintiff upon the Agreement contained in the Deed, which amounts to a Covenant on the Plaintiff;

tiff's Part to convey the Land, and so each Party hath mutual Remedy against the other; otherwise if the Specialty had been the Words of the Defendant only, and not the Words of both Parties by Way of Agreement, as here it is; and in the Conclusion it's said, both Parties have sealed it, *1 Sand. 319. Pordage and Cole ver. Case, 1 Lev. 274. & Raym. 183.*

*2 Keb. 569.*

A. by his Deed-Poll recited, That whereas he was possessed of certain Lands for Years of a certain Term, by good and lawful Conveyance he assigned the same to J. S. with divers Covenants, Articles and Agreements in the said Deed contained, which are or ought to be performed on his Part : The Question was, If this Recital [Whereas he was,] be an Article or Agreement within the Meaning of the Condition of the said Obligation, which was given to perform, &c.?

*Per Gawdy*, it is an Agreement. For in such Case I agree I am possess'd of it, for every Thing contained in the Deed is an Agreement, and not only that which I am bound

Where a Recital amounts to an Agreement.

to perform ; as if I recite by my Deed, that I am possess'd of such an Interest in certain Lands, and assign it over by the same Deed, and thereby covenant to perform all Agreements in the Deed; if I be not possess'd of such Interest, the Covenant is broken. *Per Clench*, Recital of it self is nothing, but being joined and considered with the rest of the Deed, it is Material, as here, for against this Recital he cannot say he hath any Thing in the Term. And it was resolved, that if the Party had not that Interest by a good and lawful Conveyance, the Obligation was forfeited, *1 Leon. p. 122. Severn and Clark. Agreement*

ment

## The Law of Covenants:

ment to pay makes a Covenant, 2 Mod. 92, 268, 269.

A Condition to perform Covenants and Agreements; one was, That the Plaintiff had covenanted with the Defendant, that it should be lawful for the Defendant to cut down Wood for Fireboot and Hedgeboot, without making Waste, or cutting more than necessary; the Plaintiff assigns a Breach in that Covenant (which is in Truth the Plaintiff's Covenant); the Exception was, that the Condition ought but to extend unto Covenants to be performed on the Part of the Lessee; *sed non allocat*. It is the Agreement of the Lessee, tho' it is the Covenant of the Lessor, 1 Leon. 324. Stephenson's Case.

It may be the Agreement of the Lessee, tho' it be the Covenant of the Lessor, 1 Leon. 324. *vid. supra*.

**Agreement  
of the Lessee,  
and Cova-  
enant of the  
Lessor.**

**What a.  
mounts to a  
Covenant to  
levy a Fine.**

Agreement in Articles with Covenant on the Plaintiff's Side to settle a Jointure, and on the other Side to pay 6000*l.* and it is agreed in the Articles, That a Fine was intended to be levied of such Lands, &c. for securing the Payment of the 6000*l.* Per Dom' Cancello & auters Judges, this is a Covenant to levy a Fine, 2 Mod. 87.

2 Mod. 80, 81. *What Words of Covenant or Agreement shall a-  
mount to a Lease, and what shall be a Cova-  
nant only. Vide supra Lease-Rent, and not a  
Covenant.*

**Covenant to  
permit one to another to have, hold and enjoy certain  
enjoy, &c. is Lands a die dat' for Life, this is a Covenant  
a Covenant and no Lease, and the Law will not expect  
and no Lease. If a Man covenant to permit and suffer  
any Livery, and for this he shall not be Tenant**

riant at Will, *i. Roll. Abr. 859. Tooker and Squier.*

Covenant in some Cases shall amount to a Where Covenant Grant. As, one covenants *quod Licitum foret* for the Lessee to take necessary Fireboot and Houseboot to be expended, and for the Reparation of the Premisses, *Cr. Jac. 291. Purfrey and Grymes.*

The Words, Covenant and grant that he shall enjoy the Lands for Six Years, amounts to a Lease, and shall bind the Heirs, *vid. supra Drake and Monday's Case.* And the Words of the Covenant and Grant of the Lessee, that he shall pay such a Rent yearly, amounts to a Reservation, *Cr. Jac. 207.*

G. H. being seised of Land in Fee, covenanted with M. W. to convey it by Fine or other Assurance to M. W. and his Heirs before, &c. which should be to the Use of him and his Heirs, with a Proviso, That if he paid to M. W. 100*l.* at the End of 13 Years, that then he might re-enter, and that all Assurances should be to the Conisor; and covenanted and granted for him and his Heirs with the said M. W. and his Heirs, That he and his Heirs should enjoy the said Land until the End of the said 13 Years, and after for ever, if the said 100*l.* was unpaid; and M. W. covenanted to pay yearly two Capons, and that he would not commit any Waste. Per cur' this is not a Lease, for the Intent of the Parties was, it should be a Mortgage, which is but a Covenant that he shall enjoy during the Time of the Mortgage, and not a Lease, and the Covenant for quiet Enjoyment shews as much, *Cr. Jac. 172. Evans and Thomas.*

## The Law of Covenants.

Covenant  
and grant  
that one shall  
have and  
hold the  
Land, &c.  
is a Lease.

One *Pleasance's Case*, cited Cr. *Jac.* 172. If one covenants and grants with another, that he shall have and hold his Lands for so many Years, it is a good and absolute Lease: But if he covenants and grants that he shall enjoy his Lands for Ten Years, it is not a Lease, because it sounds only in Covenant.

It was said in *Littleton and Pern's Case*, 1 *Leon.* 36, & 118, 119. If *A.* covenants with *B.* that *C.* shall have his Land for so many Years, rendering such a Rent, here is not any Lease, and therefore no Rent; but if *A.* had covenanted with *C.* himself it had been otherwise, because between the said Parties.

Agreement  
between  
Strangers not  
to amount to  
a Lease.

An Agreement or Covenant made between *J. S.* and *J. N.* that *J. D.* shall have such Lands for Years, this being made between Strangers cannot amount to a Lease. So if *J. S.* covenants with *J. D.* that his Executors shall have such Land for Twenty One Years, this cannot amount to a Lease, for they are in this Degree as Strangers, Cr. *Eliz.* 173, *Porry and Allen*, and so is *Littleton and Pern's Case*, 1 *Leon.* 136.

In Indenture of Articles the Plaintiff covenants, that *Edward*, Brother of the Defendant, should enjoy such Lands until the Feast of St. *Michael* next following, rendering such a Rent at the End of the said Term, and that *Edward* should pay such Rent. The Defendant pleaded, that his said Brother paid to the Plaintiff before the said Feast of St. *Michael*, in full Satisfaction of the said Rent, 3*s.* Plea is good, and upon the Matter the Covenant well performed, for there is not any Rent in this Case, for here is not any Lease. For if *A.* covenant with *B.* that *C.* shall have his Land for so many Years, rendering such a Rent,

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Rent, here is not any Lease, and so no Rent; otherwise if A. had covenanted with C. himself, *i Leon. 136. Littleton and Pern.*

Where J. S. covenants and *concessit* to J. N. [concessit] that he shall have Twenty Acres of Land for <sup>makes a</sup> Twenty one Years; it is a good Lease, for <sup>Lease.</sup> this Word *concessit* is as good as *dimisit*, *i Leon. 118, 119.*

By Articles between *Harrington and Wife*, it is covenanted and agreed between the Parties, that the said *James Harrington* doth let the said Lands for and during Five Years, to begin at *Michaelmas* next ensuing, provided that the said Defendant shall pay to the Plaintiff annually, during the Term, at the Feasts of St. Michael and the Annunciation, 120*l.* by equal Portions: And the said Parties do covenant, That a Lease shall be made and sealed according to the Effect of these Articles before, &c. the Feast of *All-Saints*. *Per Cur'*, <sup>Articles make an im-</sup> It is an immediate Lease because of the <sup>mediate</sup> Words, [it is agreed that he doth let,] being <sup>Lease, tho'</sup> in the Present Tense, and that which follows <sup>there is a Co-</sup> is in Reference to further Assurance, and <sup>venant there-</sup> the rather for that it is to be made after the <sup>in that a</sup> Beginning of the Term, so he ought to have <sup>Lease shall be</sup> the Term presently, at *Michaelmas*. 2. This <sup>made and</sup> Proviso is a good Reservation of the Rent, *Pr. Eliz. 486. Harrington and Wife, Mo. 459.*

The Word, Agreement, being only in the Style, and not in the Article it self, a Covenant and Promise alone will not amount to a Lease of a Freehold. *Per Tirrel*, the Reason of *Job. 33.* was, because the Word *convenit* was join'd with *agreeavit*, and a Covenant to employ has been held no Lease, *2 Keb. 268.*

## C H A P. V.

*Of Covenants in Law, and the Operation and Consequents upon it.*

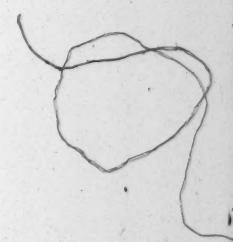
*By what Words.*

Constitute an  
Official,  
as que De-  
negatione.

**R.** By Indenture did constitute the Plaintiff Official suum, and granted him omnem & omnimodam, Archidiaconat' jurisdictionem suam, predict' absq; impetitione, denegatione, restrictione, &c. These Words absq; &c. do amount to a Covenant to make the Defendant subject to an Action, *i Leon. 277. Bishop and Redman.*

The Word *demisi* imports a Covenant. Plaintiff in his Declaration shews, That at the Time of the Lease made the Lessor was not seised of the Land, but a Stranger, and so the Covenant in Law broken; but he did not lay any actual Entry by Force of his Lease, nor any Ejectment of the Stranger, nor any claiming under him, and so no Expulsion. *Per Cur'*, the Action did well lie, for the Breach of Covenant was, that the Lessor had taken upon him to demise that which he could not, and [*demisi*] imports a Power of Letting, as *dedi* does of Giving; and it is not reasonable to force the Lessee to enter upon the Land, and so to commit a Trespass, *Hob. p. 12. Holder and Taylor.* And so by the Word [*demisi*] Action of Covenant lies, tho' he never enter. But,

Covenant was brought upon the Word Where *Co-*  
 [demisi] for not repairing a Pump, where *venant lies*.  
 the Use of the Pump is let. It is said in  
 1 Sid. 430. *Pomfret and Rycroft, mesme Case,*  
 1 Sand. 321. & 1 Vent. 26, 44. Regularly  
 no Covenant lies upon the Word [demisi] un-  
 less in Case of Eviction of *Lessee*, and actual  
 Ouster or Expulsion by the Lessor, or a  
 Stranger, as *Noke's Case* is; and so it was  
 adjudged in the Exchequer-Chamber, that  
 Covenant lies not. And tho' the Soil it self  
 was excepted where the Pump stood, yet  
 the *Lessee* may enter and repair the Pump.



R. lets the Mannor of D. to H. for Twenty one Years, and after, by the Words *dedi & concessi, & ad firmam tradidi*, lets the same Mannor to the Plaintiff for Life, who enters and is ousted by H. and so he brought Covenant. If the entire Estate for Life be evicted under the Title of the Lessor, Lessee shall not have Covenant, for by this he shall recover but Damages which are Personal, and are not a Recompence for the Loss of a Freehold. *Aliter*, for the Loss of Possession for a Time, and so it being but a Term evicted, the Lessee shall have covenant upon those Words in Law. The Words in the Lease will enure to a double Warranty, *dedi* to a Franck-Tenement, and *dimisi* to an Eviction for Years, Hob. p. 3. R. 28. Yelv. 139. *Pinchcomb and Rudge*, 1 Rol. Rep. 25. Noy. 131.

Lessee not to  
have Cove-  
nant where  
the Eviction  
is of a Fee-  
hold.

The Words [assign, set over, and transfer, *vendidit, assignavit, & transfulvit*,] do not [*Vndidit, af- signavit, & transfulvit*], amount to a Covenant against an Eigne Title, yet against the Covenantor himself it will amount to a Covenant; as a Covenant against all claiming by, from, or under me; and if I enter, Covenant lies against me upon the

[*Vndidit, af- signavit, & transfulvit*], how they amount to a Covenant, and how i or.

## The Law of Covenants.

Wrong: So upon the Reservation of Rent to a Stranger, Debt lies not by the Stranger, he may have an Action of Covenant for Non-Payment, and so may the Lessor : by *Hales* 3 *Keb.* 304. *Deering and Farringdon.*

Grant of an Authority, to act, &c. *absq; imputatione, denegatione, restrictione, &c.* do amount to a Covenant, 1 *Leon.* 277.

Tenant for Life, Remainder in Fee to another, and the Tenant for Life, by the Words [demise or grant], doth make a Lease for Years, and dies, and after he in Remainder doth enter, and oust the Lessee for Years ; in this Case, he cannot upon this Covenant in Law charge the Executors or Administrators of the Lessor, but upon an express Covenant for quiet Enjoying he may, *Dier* 257. *Pl.* 13. 3 *Cro.* 157. *Landydale ver. Chruey.* 1 *Leon.* 179.

If a Man let the Land of *J. S.* by Deed to *J. D.* *J. S.* being in Possession at the Time of the Lease, and Lessee enters upon *J. S.* who re-enters, yet *J. D.* shall not have Action of Covenant upon this, because *the Covenant in Law ought to be fix'd upon an Estate* ; but here was not any Estate, for this was a void Lease, and the Lessee a Disseisor by his Entry.

*If a Stranger enters before Lessee enters, no Covenant lies.*

And by *Fenner*, If a Man let Lands for Years, and a Stranger enters before the Lessee enter, he shall not have an Action of Covenant upon this Ouster, because he was never Lessee in Privity to have this Action, 1 *Rol. Abr.* 520. but it's said there in *Stile and Herring's Case*, If a Man let to me my own Land, whereof I am seised in Fee or otherwise by Indenture, if I am ousted by another that had Right, I shall have a Writ of Covenant.

*No Covenant in Law upon Eviction of Goods.*

If a Man leaseth certain Goods for Years by Indenture, which are evicted within the Term,

Term, yet he shall not have a Writ of Covenant, for the Law doth not create any Covenant upon such personal Things, *i Rol.*

*Abr. 519. Bedford's Case : Sed Qu. & vide Rolls.*

*A Covenant in Law shall not be extended to make a Man do more than he can.* *F.* and his Wife seised of Land in the Right of the Wife for Term of her Life, and they joyn in a Lease by the Words *Demise and Grant.* *F.* dyes, his Wife enters and avoids the Lease, Lessee is put out of Possession by Ejectment; and brings Covenant against the Executors of *F.* upon the Words *Demise and Grant*, and on Demurrer Judgment pro Defendant; the Words were, *Demise, Grant, and to Farm let for Years,* if the Wife should so long live, *i Brownl. 22.*

The Defendant let to the Plaintiff an House in London by these Words, *demise grant, &c.* and the Lessor covenants, That the Lessee shall enjoy the House during the Term without Eviction by the Lessor, or any Claiming under him, and the Lessor was obliged to perform all Covenants, Grants, and Articles in the Indenture. The Plaintiff grants his Term over to a Stranger in Debt; upon this Obligation the Defendant pleads Performance of all Covenants; the Plaintiff assigns a Breach, that one *Savery* enter'd upon the Assignee, and made a Lease for Seven Years to one *D.* if he should so long live, who brings Ejectment against the Assignee, and recovered. Defendant demurs in Law: The Court was against the Plaintiff, and resolved,

1. That by this Covenant in Law upon these Words, *demise and grant*, the Assignee shall not have a Writ of Covenant, *Dier 257.*

Assignee shall have a Writ of Covenant on the Words *Demise and Grant.*

## The Law of Covenants.

2. That by this Breach of Covenant, the Obligation in Law was forfeited, for he was bound to perform all Covenants, Grants, &c. which extend as well to Covenants in Law, as to Covenants in Fact.

Pleading Entry by a Stranger, he must shew he had Eigne Title.

3. Altho' that the Recovery was by Verdict, yet the Plaintiff ought to have shewed that *Savery* had elder Title, for otherwise the Covenant in Law was not broken, and because he did not shew it, for this Cause they resolved against the Plaintiff.

4. The said express Covenant qualifies the Generality of the Covenant in Law, and restrains it by the mutual Consent of both Parties, that this shall not extend further than the express Covenant.

Particular Covenant subsequent, qualifies the general Force of this Word [demis].

And it is but Reason, that the particular Covenant subsequent should qualify the general Force of this Word *demis*, for otherwise the particular Covenant should be in vain, if the Force of this Word *demis* should stand, 4 Rep. 80. *Nokes's Case*.

*Note*, When a Covenant is created by Law, the Covenantee cannot have Covenant if he be not ousted by one who hath Title; but upon express Covenant it lies, tho' a Stranger enters without Title, 2 *Brownl.* 161, 162, b.

Now, altho' upon express Covenant to pay Rent, Covenant lies against the Lessee for Rent after Assignment; yet it seems such Action doth not lie against a Lessee upon a Covenant in Law [as yielding and paying] after the Assignment, *Sid.* 447.

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C H A P. VI.

*Construction.*

Where express Covenant qualifies the general,  
and where a particular Covenant doth not qua-  
lify the general.

**C**ovenant to enjoy *absq; legali molestatione,* Where a ge-  
of the Defendant, Rainsford conceived a general Entry no Breach, (for that shall be neral Entry,  
intended tortious) and the general Covenant no Breach.  
is restrained by special Covenant against any  
lawful Let, 2 Keb. 717, 723. Lee and Dalton  
ver. Scurre.

*Johnson* and *Vavasor* Joynt-Tenants of a  
Mill by Lease for Years. *Vavasor* assigns all  
his Interest in the Mill to another, without  
*Johnson's Assent or Privity*, and dyes. *John-  
son* afterwards recites this Indenture by Lease,  
and that all came to him by Survivorship,  
grants the said Mill and all his Estate, Title  
and Interest, to *Proctor*, and covenants that  
he shall quietly enjoy it, notwithstanding any  
Act done by him, and Bond of Covenant,  
and Action of Debt upon the Bond. *John-  
son* pleads, that the Plaintiff had enjoyed it,  
notwithstanding any Act done by him. *Proctor*  
replied, that *Vavasor* Joynt-Tenant with *John-  
son*, assigned his Estate to *J. D.* who entered  
and expelled him. Defendant demurs, and  
it was adjudged against the Defendant, for he had no  
Power to grant one Moiety, and yet he had  
expressly granted the Mill to *Proctor*. And  
the

## The Law of Covenants.

Where not  
qualified by  
the Covenant  
ensuing.

*4 Rep. 80. 6.*

Assignee  
shall have  
this Action  
on a Cova-  
nant in Law.

the Condition of the Obligation being to perform all Grants; the Grant being defective at the first as to a Moiety, which is the Substance of the Agreement of all the Parties, this is not qualified by the Covenant ensuing. And it is not like to *Nokes's Case*,<sup>4 Rep.</sup> for there the Grant was good for the whole, and becomes ill by Eviction afterwards, and therefore in that Case the Covenant ensuing qualify'd the general Covenant, *tel. p. 175.* *2 Cro. 233. Lit. 206. 1 Bulst. 3, 4. Proctor and Johnson, 2 Brownl. 212. mesme Case. Nokes Case was,* The Defendant let an House to the Plaintiff by the Words *demise and grant*, which Words import a Covenant in Law, and the Lessor covenants, that the Lessee shall enjoy the House, during the Term, without Eviction by the Lessor, or any claiming under him (which express Covenant was narrower than the other) and gave Bond to perform Covenants. The Plaintiff grants his Term over to a Stranger. The Plaintiff assigned for Breach, that one *S.* entered upon the Assignee and recovered in Ejection, and Debt was brought upon this Bond. *Per Cur'*, by this Covenant in Law the Assignee shall have a Writ of Covenant, and for this Breach of the Covenant in Law the Obligation was forfeited; but because the Plaintiff did not shew that *S.* had a Covenant-Title, (for otherwise the Covenant in Law was not broken) Judgment against the Plaintiff; and *per tot. Cur'*, the express Covenant qualifies the generality of the Covenant in Law, and it shall not extend further than the express Covenant.

An

An express Covenant controuls an implied one, but he may use either of them at his Pleasure. A special Warranty controuls a general, and the Reason is, no Man will take an express special Warranty, when the Intent is he shall have a general Warranty,  
*per Hob. Winch 93, 94. Sir George Trenchard's Case.*

An express Covenant controuls an implied one; so of a Warranty, and why.

Defendant by Indenture grants a Fee-Farm Rent to the Plaintiff, which he had purchased of the King's Lands in the late Times, and covenanted that he was seised in Fee, and had good Right to sell, and Breach assigned that he had not good Right. Defendant pleads, that *ulterius agreeat' fuit in eadem Indentura*, that the Covenants in the Indenture shall not extend to Acts further than to Acts done by the Vender and his Heirs. Plaintiff demurs. *Per Cur'*, tho' this is a remote Agreement at the End of the Deed, and far distant from the other Covenant, yet this hath qualified the first Covenant, and restrains it to Acts done by the Covenantor himself only, *as 4 Rep. Nokes's Case, 1 Lev. 57. Brown and Brown, 1 Keb. 234.*

A remote Agreement at the End of a Deed, qualifies the former Part.

#### Construction of Covenants.

A Parson lets his Rectory for Three Years, and covenanted that the Lessee shall have and enjoy it during the said Term without Expulsion, or any Thing done or to be done by the Lessor, and afterwards for not reading the Articles he was deprived by the Stat. 13 Eliz. *ipso facto*. The Patron presents another, who being inducted ousts the Lessee; it was on a Bond to perform Covenants. *Per Cur'*, this Matter is not any Cause

of

## The Law of Covenants.

Any Thing  
to be done  
by the Lessor.  
A Nonfea-  
lance no Act.

of Action, for the Lessee was not ousted by any Act done by the Lessor, but rather for Nonfeasance, and so out of the Compass of the Covenant: As if a Man be bound, he shall not do any Waste, permissive Waste is not within the Danger of it, 4 Leon. 38, 39.

Covenant to  
find Victuals  
for a Celle-  
rer of a Pri-  
ory, which is  
dissolved, he  
shall find it  
for the Stew-  
ard.

The Prior of *Norwich* made Lease for Life by Indenture, in which the Lessee covenanted to find Victuals to the Cellarer at all Times when the Cellarer came thither to hold Courts. The Priory was dissolved, and the Possessions given to the Dean and Chapter newly erected. The Court held, that the Lessee should perform that Covenant to him who supplied the Office of Cellarer, i. e. the Steward, 4 Leon. 187.

*Periculis & ca-  
sualitatibus  
Maris excep-  
tis. To what it  
extends.*

Merchants by Charterparty covenant with the Owners, that the Ship shall return into the River of *Thames* in a certain Time, *periculis & casualitatibus Marium*, [Anglice, Danger of the Sea exceptis]. The Ship is taken by Pirates, it is within the Exception, and it extends to Pirates as well as Tempests, 2 Rol. Abr. 248. *Pickering and Barkley, Stiles 132.*

Covenant to  
repair, extend  
to Houses af-  
ter built.

Lessee covenants to build Three Houses on the Premisses, and to keep them in Repair; and it's also covenanted to deliver up *dicta premissa & domus, & edificia superinde fore erect.* He builds Four Houses, and lets one fall to Decay: This Covenant extends to the 4th, 1 Vent. 126. *Douse and Cale, & 3 Lev. 264.*

Covenant in  
the Copula-  
tive and in the  
Disjunctive.

The Covenant is, That the Defendant would not take Timber without the Assent and Assignment of the Lessor or his Assigns in the Disjunctive; and in the Breach, the Plaintiff charged the Defendant with cutting of Timber without the Assignment of the Lessor or his Assigns; so he would compel the

the Defendant to prove more than he ought, for if he did it with their Assent only, or Assignment only, it had been sufficient; but if the Covenant had been in the Copulative, both had been necessary, 1 Leon. 250. per Hoptart, *Sherwood, and Noun.*

By Virtue of his Lease, the Tenant of common Right may take necessary Fewel upon any Part of the Land leased, 28 H. 8. 19. The Lessor covenants, that the Lessee shall have sufficient Hedgeboot, by the Assignment of the Baily. It is holden by *Baldwin and Shelle's Case*, That the Lessee may take it without Assignment, because there are no negative Words, & non aliter, 1 Leon. 251.

The Defendant covenanted with the Plaintiff, that after Assertainment of the Profits of the Land, the Defendant shall have one Mosity of the Profits, and the Plaintiff the other; there need no other Averment of the Assertainment, but that the Defendant had received so much Profits of the Land, 1 Sand. 48, 49, 50.

Certain Lands with a Stock of Sheep were Leased by Indenture, and the Lessee did covenant by the said Indenture to restore to the Lessee at the End of the Term so many Sheep in Number as he took in Lease, and that they should be between the Age of Two and Four Years. Afterwards the Lessee granted the same Stock to a Stranger, whereas in Truth all the ancient Stock was spent. It was held by all the Justices on Evidence given at the Bar, that when such a Stock of Sheep is leased for Years, the principal Property doth remain in the Lessor as long as those Sheep which were *in esse* at the Time of the Lease should live; but if any of them

Lease of a Stock of Sheep, and the old ones dye, and new ones are put in their dye, Rooms.

dye, and other come in their Rooms, then the Property of those new Sheep doth belong to the Lessee; and therefore they held, that the second Lessee should have so many of the Sheep as were left and did remain at the End of the Lease, and no other, *Godb. 113. Wood and Aſh, Owen 139. 1 Leon. 42.*

Covenant to  
leave in as  
good Plight,  
and cuts  
down a Tree.

Lessee covenanted to leave the Houses, Trees and Woods, at the End of the Term in as good Plight as he found them, and afterwards the Lessee cut down a Tree. In this Case the Covenant is broken, and the Lessor shall not stay till the End of the Term to bring his Action of Covenant, because it is apparent that the Tree cannot grow again, and be in as good Plight as when he took the Lease, *Godb. 335.*

Where De-  
fendant is be-  
tween Enjoy-  
ment during  
the Term,  
and during  
the Term of  
Twenty  
Years.

Tenant for Life makes a Lease for Twenty Years, and covenants that he shall enjoy it during the Term; that shall be construed during his Life, for the Term ended by his Death: *Alier*, if he had covenanted during the Term of Twenty Years, *1 Brownl. 22.*

An Act done,  
tho' after  
Words dis-  
solved or re-  
versed by  
Law, saves  
the Perfor-  
mance.

One covenants that *T. H.* Son and Heir apparent of *J. H.* shall marry *E. L.* before the said *T. H.* and *E. L.* shall fulfil their several Ages of 14 Years, if *E. L.* would consent thereunto; afterwards *T. H.* married *E. L.* *T. H.* being then Thirteen Years old, and *E. L.* Nine Years old and no more; after *T. H.* came to the Age of Fourteen Years, and disagreed to the said Marriage. All this was pleaded in Bar as a Performance of the Covenant, and good: The Covenantor is bound that *T. H.* shall marry *E. L.* which was executed; but he is not bound to the Continuance of it, but that ought to be left to the Law.

Law. If *J.* be bound to you, that *J. S.* (who in Truth is an Infant) shall levy a Fine before such a Day, which is done accordingly, and afterwards the same is reversed by Error, yet the Condition is performed, *1 Leon. p. 52. Leigh and Hanmer.*

*Covenant in many Cases to extend further than the Words.*

*A.* and *B.* are Executors to *C.* who was a Freeman of *London*, and *A.* upon the Marriage of *E.* the Daughter of *C.* covenants with *F.* who is to marry with *E.* *Quod licitum foret prefat' F. de tempore in tempus post matrimonium praedict' videre & perscrutare omnes tales computos qui tangerent, the Estate of C. the Testator, by which he may view what Monies are due to be paid to E.* In this Case, if *B.* the other Executor had some Accounts which concern the said Estate of the Testator, and *B.* requests *A.* and *B.* to view and search the said Accounts, and *B.* refuseth to permit him to do it, but *A.* saith he will not deny him to do it, yet *A.* had broken the Covenant; for by this Covenant he had undertaken for *A.* and all other Strangers who have any such Accounts, that they shall permit *F.* to view and search them by Force of the Words of the Covenant [*Licitum foret prefat' F. &c.*] *8. Car. B. R. Roberts and Willmot.*

If a Lease for Years be made to *A.* determinable upon the Lives of *B.* *C.* and *D.* and after *B.* dies, and after *A.* assigns to *E.* and after *E.* by Indenture reciting the said Lease, and the Death of *B.* and the Assignment to *F.* by the said Indenture, now assigns to

*F.*

## The Law of Covenants.

*F.* and covenants with him, that he himself is lawfully possessed of all the Premises of a good and sufficient Estate for the residue of the said Term then to come : *If the said C. and D. and either of them, shall happen so long to live, and they the said C. and D. are yet in full Life ;* yet this is imploied by the Words, **Several Covenant.** and this ought to be a several Covenant, or otherwise this last Part would be void and of none Effect. *Inter Baker and Scott, Tr. ii Car. i.* in which the Breach was assigned, for that C. was dead at the Time of the Assignment *F.* made to him, and the Word [that] was added to the other Words in the Declaration, and the Defendant demanded Oyer of the Declaration, which was enter'd in *hac verba*, in which the Word [that] was not yet, for that this was no more than the Law implies, it was adjudged good, *i Rol. Abr.*

249.

*A.* seised of Lands lets it for Years, and covenants and grants to and with the Lessee, his Executors and Assigns, That it shall be lawful for him to take and carry away to his own Use such Grain that shall be growing on the Land at the End of the Term, tho' the Word Covenant be joined with the Word Grant, and tho' the Words are not by way of Gift of the Grain, but that it shall be lawful for him, &c. yet this shall be a Grant, and shall transfer the Property of the Grain that shall be growing at the End of the Term, for the Intent of such Words in common Use amount to so much as the Clause, without Impeachment of Waste, transfers a Property in the Trees, *Hob. Grantham and Hawley.*

Where the Words [It shall be lawful to carry away,] transfer a Proprietary.

One covenants to make a Lease of all his Lands in D. and in D. he hath as well Copyhold as Freehold Lands, he is not by this Covenant to make a Lease of his Copyhold Land, for that he cannot do without Licence, *r Anderson, More 294. Crocock and White.*

make a Lease  
of all his  
Lands in D.  
and he hath  
Copyhold  
there.

**Bond or Covenant,** That if the Defendant should work out the 40*l.* (which he owed, &c.) at the usual Prices in Packing, when the Plaintiff should have Occasion for himself or his Friends to employ him therein, or otherwise shall pay the 40*l.* then, &c. Defendant pleads, that he was always ready to have wrought out the 40*l.* but that the Plaintiff did never employ him; ill Plea, because the Defendant did not aver that the Plaintiff had any Occasion to make Use of him, and that it was at his Election to have Work or Money; and not having employed him, but wrought his Action, that is a Request in Law, and so he hath determined his Election to have the Money. Judgment *pro Quer.* 2 Mod. 304. *Right and Bull.*

Defendant covenanted, If the Plaintiff marry his Daughter, to pay to him 20*l. per Annum*, without mentioning *Quandiu*, and affirms a Breach in Non-Payment for two Years. Defendant *quoad* the first Year pleads Payment, and *quoad* the other demurs, supposing that no Time being limited, that he was not bound to pay more than one Year; but the Court inclined that the Payment shall be for Life, for Yearly imports more than one Year; but whether for the Life of the Husband or the Wife non determinat' fuit; some said for the Life of the Husband, because it is in lieu of a Portion, and shall be taken strong against the Covenantor; others

Covenant, If the Plaintiff marry his Daughter, to pay to him 20*l. per Annum*, and saith not how long.

## The Law of Covenants.

Of the other  
Part was  
*Levins* 102.  
*Hock and*  
*Swain,*  
*1 Lev. Sid.*  
151.

for the Life of the Wife, because it is for a Marriage-Portion for her: *Death and Benn's Case*, 3 *Jac.* 2. A Widow covenanted on Marriage with her Husband, that he shall enjoy the Lands of the Wife during their Joint Lives, and the Husband covenanted with the Trustees of the Wife to pay to them 20*l.* yearly, and adjudged for their Two Lives.

### Covenant. Construction.

If the Words of a Covenant be, [That the Lessee shall have Thorns by the Assignment of the Lessor, and necessary Fuel also;] it seems by this that there must be an Assignment of the Fuel as well as of the Thorns, *Dier* 19.

Diversity be-  
tween affir-  
mative  
Words and  
negative.

If the Lessor covenant with his Lessee, that he shall have sufficient Hedgeboot, by Assignment of the Bayliff of the Lessor, by this the Lessee is not restrained from that Liberty that the Law doth give him, and therefore he may take without Assignment; but if the Words be negative, that he shall not take without Assignment, or that he shall take by Assignment and not otherwise, *contra Dier* 19. b.

If a Man makes a Lease for Years of a Mannor, and covenants that the Lessee shall make Estates for Life or Years, and that they shall be good in this Case; it seems this Covenant shall not be taken to enable the Lessee to make Estates for a longer Time than his Estate will bear, *per Justice Bridgman.*

If one makes a Lease for Ten Years, and covenant, That if the Lessee pay him 10*l.* within the Ten Years, that he shall have the Fee-Simple, and the Lessee surrenders his Estate

Estate within the Time ; in this Case, if the Lessee pay the Money, the Lessor is bound to make the Fee-Simple to him : But if the Words of the Covenant be, That if he pay him 10*l.* within the Term, he shall have Fee, and the Lessee surrenders his Term, and then pays the 10*l.* In this Case the Lessor is not bound to make the Fee-Simple, for it was not paid within the Term, 1 Rep. 144.

If Two make a Lease, and covenant that the Lessee shall enjoy the Land without the Let of them or any other, and One of them alone doth disturb the Lessee, this is a Breach of the Covenant.

Debt on Bond against G. a Merchant Stranger. Defendant pleaded that the Bond was for Performance of Covenant, in certain Indentures contained and shewed what, &c. and alledged further, that in the said Indenture there is a Proviso, That if any *Lis vel controversia oriatur imposterum*, by Reason of any Clause, Article, or other Agreement in the said Indenture contained, that then before any Suit thereupon attempted, the Parties shall choose Four indifferent Persons for the ending thereof ; which being done, the Indenture and Obligation shall be void. And *in facto dicit quod Lis & controversia*, upon which the Action is brought, groweth upon the same Indenture. Plaintiff demurs, and because the Defendant did not shew specially upon what Controversy and Strife, and upon what Article certain, the Court were clearly of Opinion the War was ill, and the Court were of Opinion that the said Proviso did not extend to subject and submit the Breach of every Covenant or Article, &c. but only where the Controversy doth arise upon the Construction

The Clause  
[If any Strife  
arise, to  
be submitted  
to Arbitra-  
ment] how to  
be construed.

## The Law of Covenants.

of any Covenant, &c. within the same,  
1 Leon. 37. *Parmot & Griffin.*

A Man seised in Fee of a Parcel of Land, called *Parkhill*, containing 60 Acres, and divides this into Three Parts, and lets one Part of it to *A.* for Years, and after, during the Term, makes a Lease to *B.* by these Words, *scilicet*, [*Two Parcels of Parkhill*], containing in it self 60 Acres of Land for Years, altho' that all the Three Parts do not exceed 60 Acres, yet but Two Parts shall pass by this Grant, for the Intent of the Grant appears to be such, and so the Lessee shall not have a Writ of Covenant for the other Third Part, 2 *Rol.* Abr. 50. *Floyd and Petty.*

*Mason* leased Lands to *R.* for Years, and afterwards leased the same Lands to *Tinter* for Years. *Tinter* covenants with the Defendant, That if the said *R.* should sue *Mason* by Reason of the latter Lease, that then he would indemnify *Mason*, and pay to him all the Charges by Reason of any Suit to be brought by the said *R.* in respect to the said former Lease; and *Mason* by the same Indenture covenants with *Tinter*, That the Land demised should continue to *Tinter*, discharged of former Charges, Bargains and Incumbrances. *Tinter* brought Action on the Second Covenant, and shewed that *R.* had ejected him. *Mason* pleads the said Second Covenant, intending that by that latter Covenant the Plaintiff had Notice of the former Lease made to *R.* so that the first Lease shall be excepted out of the Covenants of former Grants, to avoid Circuit of Action. *Cur' contra*, for the Covenant of *Mason* shall go to the Discharge of the Land, but the Covenant of *Tinter* only to the Possession, 3 *Leon.* 123. *Mason's Case.*

*Construction*

*Construction according to Intent.*

Defendant covenanted, That the Plaintiff, his Executors, &c. valeant & possint habere, for Years, from the 29th of September then next ensuing the Date, &c. seven Parts of all the Grains made in the Defendant's Brewhouse, &c. and assigns one Breach (*inter alia*) that he, with Intention to deceive the Plaintiff, did put divers Quantities of Hops into the Malt, by which the Grains were spoiled. It was moved in Arrest of Judgment, that this Breach is out of the Articles, viz. The putting in Hops into the Grains, and the Damages being entire, the Plaintiff ought not to have judgment. *Per Cur'*, The Intention of the Parties is to be considered in all Contracts ; and it was the Intent of the Parties, that the Plaintiff should have the Grains for the Use of the Cattle, and they will not eat them when Hops are put in : So if I covenant, that I will leave all the Timber which is growing on the Land (I hire) at the End of the Term ; if I cut them down, though I leave them on the Land, it is a Breach of Covenant. So if I covenant to deliver so many Yards of Cloth, and I cut it in Pieces, and then deliver it, it is a Breach of Covenant, for the Law discountenances all Acts which are in *Fraudem Legis*. *Ray. 464. Griffith and Goodhand. Et Sir Tho. Jones, 191.*

The Inten-  
tion of the  
Parties is to  
be considered  
in Contracts.

Covenant to  
leave the  
Timber on  
the Land. If  
I cut it  
down and  
leave it, it's  
no Perfor-  
mance.

A Covenant not to assign a Thing in Action to any Person whatsoever ; an Assignment in Equity is a Breach of the Covenant, for, in Law, no Assignment can be of a Thing in Action ; therefore the Intent of the Covenant must be such an Assignment as

Covenant not  
to assign a  
Thing in  
Action.

can be said an Assignment in Equity. *Raym.* 459, 460, 461. *Et Sir Tho. Jones 150.*

**Covenant**  
that he shall  
not molest or  
hurt the O.  
bligee to  
what it doth  
not extend.

If Covenant or Condition be, that he shall not molest or hurt the Obligee or Covenantee, *Ratione alicuius rei cujuscunque*, it shall be intended he shall not hurt tortiously; but not to restrain him from prosecuting the Obligee for Felony, or other just Cause. *Cro. Eliz. 705. Dobson and Crew.*

**Covenant to**  
pay all Taxes  
(in Bishop's  
Leases.)

The Covenant to pay all Taxes (in Bishop's Leases), is not intended of any other Taxes than such as were in Being and Use before, and ancient for Lessees to pay; and that was only against Synodals, Procurations, Tents and Subsidies, and not to Charges of another Nature. *3 Keb. 69. Davenant and the Bishop of Salisbury. 2 Lev. 68. 1 Vent. 223.*

#### Construction on Covenants.

**Reg.** When a Man is bound to do or permit a Thing, he ought to do or permit all which depends upon it in the Performance of the Thing. *11 H. 4. 25. 1 Rol. Abr. 422.*

**Collateral**  
Things to be  
done or per-  
mitted.

Collateral Things must be done or permitted. A Covenant to levy a Fine, it must be at his Costs who levies it. A Man is bound to carry my Corn, it is no Plea for him to say, he had no Cart, for he is bound by Implication to provide a Cart, and all other Necessaries for the Carriage: So to mow my Grafs, he must find Instruments. *16 H. 29.*

Covenant, That J. S. shall have Ingrels into his House, he ought to have common Entrance at the usual Door, and shall not be put to enter by an Hole backward; nor may the other make a Ditch before the Door. If

I covenant to suffer J.S. to have a Way over my Land, if I lock the Gates, I have broken my Covenant. *Latcb. 47.*

Reg. *A Man shall be supposed by the Covenant to do what properly belongs to him.*

Covenant was, That the Great Bell of M. should be carried to the House of the Covenantor in W. at the Costs of the Men of W. and there to be weigh'd in the Presence of, &c. the Covenantor ought to weigh it, for it belongs to his Occupation. *1 Rol. Abr. 465. Pl. 32.*

If a Man be bound to mow my Grafs, he must find Instruments.

Covenant to serve his Lessor with Carts, as he shall be required; Breach laid, that he requested him to bring Three Loads of Coals. Lessee pleads, That at that Time he had not any Cart or Carriage. *Latcb. 202.* It's no Plea, for he is bound by Implication to find Cart, &c.

If Lessee of an House covenant not to ease the Shop, Yard, or other Things pertaining to the House, to one that sells Coals, and after he lets all the House to one that sells Coals, he has broken the Condition, for he had broken the Intent. *1 Rol. Abr. 427. Bonner and Langley.*

Reg. *Voluntary Acts of the Lessor, &c. and a Misfeasance to avoid or adnull their own Grant, may amount to a Breach of Covenant.*

If a Man by Deed grants a Water-Course, and stops it up, the Grantee shall have Action of Covenant against him: So if a Lease be made of an House and Estovers, if Lessor destroys all the Wood out of which the Estovers were to be taken, Lessee shall have Action of Covenant against the Lessor. So

*After in Case of Nonfeasance,* if a Man by Deed demise a middle Room, and after will not repair the Roof. *After,* in Case of Nonfeasance, as was Pomfret and Rycroft's Case. If a Lease be made of an House and a Piece of Land (except the Land upon which a Pump stood) with the Use of the said Pump, the Lessee may repair the Pump; but no Action of Covenant lies against the Lessor for not repairing it, *i Sand. 322.* For here is no Misfeasance, but a Nonfeasance.

Reg. *Covenant to be performed in convenient Time.* *Vide Request.*

If *W.* in Consideration that *T.* will marry his Cousin before the Return of *W.* from London to Norwich, assumes and promiseth, after his Return from London to Norwich afore said, to pay to *T.* 10*l.* and to find sufficient Surety to pay 40*l.* more at the Death of *W.* and after *T.* marries with *M.* and *W.* returns from London to Norwich, he ought to pay the 10*l.* and find the Security for 40*l.* within a convenient Time after his Return; and there need no Request, for he had taken upon him to do it at his Peril. *i Rol. Abr. 438. Peeter and Carter.*

Where needs no Request.

If a Man covenant to make further Assurance at all Time and Times, at the Charges of the Covenantee, and Council adviseth he shall levy a Fine, yet he is not bound to do it presently, but he shall have convenient Time to do it, though the Words are, That he shall do it [*at all Times*], for the Words ought to have a reasonable Construction. *i Rol. Abr. 441. Perpoint and Thimbleby.*

[*at all Times*,  
how to be  
expounded.]

## The Law of Covenants.

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But if it be to convey Land upon Request, if a Writing purporting a Conveyance be tendered to him with Request to seal it, he ought to seal it presently. *Id. ibid. Sontes and Smith.*

In Covenant, a Special Verdict was found; The Case was, in Consideration of 20 Guineas, paid by the Plaintiff to the Defendant on such a Day, &c. he did covenant, &c. upon Payment of 500*l.* more, within one Month next following, upon Notice to transfer to him certain Shares in the *East-India Company*; and the Plaintiff did aver, That he did tender the 500*l.* within a Month, &c. Defendant pleads, The Plaintiff did not tender the 500*l.* within a Month, for that before such Tender, 28 Days were past from the Day of the Date of the Agreement; the Truth was, he did tender the 500*l.* after 28 Days, but within a Kalender Month, and it was so found by the Jury. The Qu' was, What shall be intended a Month within this Agreement?

Regularly a Month is accounted no more than 28 Days; unless it is in a *Qu' Imped'*, and there a few more Days are allowed, on purpose to save a Lapse. *1 Inst. 135. 2 Eliz. 100. 2 Cr. 166.*

Month, how  
to be compu-  
ted.

'Tis likewise so in a Lease rendering Rent, at the Two most usual Feasts in the Year, or within a Month after; and if it is behind by the Space of 8 Weeks, then, &c. these Eight Weeks shall be reckoned according to 28 Days, by the *Stat' 2 Ed. 6.* The Suggestion on a Prohibition ought to be proved within 6 Months next after the Prohibition granted; the Computation must be after the Rate of 28 Days to a Month; and so it was held in the Principal Case. *4 Mod. 185. Barkdale and Morgan,*

Com-

## The Law of Covenants,

*Constructions of Words, Sentences, and relative  
Clauses in Covenants. Vide Sparsum.*

Being reasonably required.

Covenant or Condition faithfully to execute the Office of, &c. and Quarterly to make accompt of all Monies by him receiv'd, &c. and pay all Monies by him received, and to account at such Times as he shall be reasonably required. Defendant pleads Performance to all but the Account, and for that he saith he was never reasonably required to do it. *Per Cur'*, this Clause [*being reasonably required*] goes only to the Payment of the Money, being the last Antecedent, and the Accompt is limited to be made Quarterly. *Litt. Rep. 101. King and Point's Case.*

[*During the Term*]. Covenant upon Indenture of Lease for 9 Years, dated the 1st of June, 16 Car. 2. which was to save the Plaintiff harmless of all Evictions during the said Term, and the Breach assigned was Eviction 26 June, 16 Car. 2. Defendant pleads, That the said Deed was *Primo deliberat*, 1 June, 17 Car. 2. which was after the Breach assigned; and pleads further, That the Plaintiff was not ejected after the Delivery of the said Deed: Upon this the Plaintiff demurs; and *per Cur'*, these Words [*during the Term*] shall be construed during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it first commenced in Point of Interest, and Judgment *pro Quer'*. 1 Sid. 374. *Lewis and Hilliard. 2 Keeble 377.*

[*During the Time*]. Covenant or Condition. Whereas the Lord A. deputed T. J. to be his Deputy Post-Master, to execute the said Office from, &c. for the Term of 6 Months following: Now if the said T. J. covenants for

## The Law of Covenants.

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for and during all the Time, that he shall continue Deputy Post-Master, execute and pay such Money, &c. *Per Cur'*, the Covenant refers to the Recital only, whereby the Defendant was bound only during the Six Months, and no longer, and the indefinite Time shall be construed during the Six Months. 2 Sand. 411. Lord *Arlington* and *Merrick*.

[Payments]. A Condition to perform all Covenants, Payments and Agreements, contained in a Deed-Poll. Defendant pleads the Deed-Poll in *bac verba*, in which was contained one Grant of Lands for 100*l.* and 200*l.* to be paid; in which was a Proviso, If the Defendant should not pay for the Plaintiff to *J. S.* 40*l.* such a Day, the Bargain to be void: The Defendant pleads Performance of all Covenants; the Plaintiff assigns a Breach in not Payment of the 40*l.* Defendant demurs; Judgment *pro* Defendant; the Word [Payment] in the Condition, shall have Relation only to such Payments mentioned in the Deed as is compulsory to the Defendant; but this was not, for the Defendant, if he will, may forfeit his Land. 1 Brownl. 113. *Brisco and King.* Et 2 Cro. 281. Rel. 206. But 2 *Levin.* 116. *Tomles vide Chandler,* is contrary.

[Ballast]. Condition or Covenant was, to enjoy a Ship without Disturbance. The Case was, after Sale of the said Ship, a Stranger sues the Plaintiff for Money due for certain Ballast bought by the Defendant, and put into the Ship before the Sale of the Ship. *Per Cur'*, Ballast is no Furniture of a Ship, but Guns are, 1 Leon. Case 59. fo. 46. *Kinter's Case.*

Note,

## The Law of Covenants.

*Note.* The Heir is comprehended within the Word, *Assigns*, with Respect to the Performance of Conditions and Covenants.  
Hardr. II. Pl. 288. 5 Rep. 96.

[*At all Times*]. *Vide supra*, *Perpoint* and *Thimbleby's Case*.

[*Suffer*]. A Man makes a Lease for Years, &c. and a Bond, with Conditions, That he shall suffer the Lessee peaceably to enjoy during the Term, and that without Trouble or Eviction of the Lessor, or any other Person. *Per Cur*, The Word [*Suffer*] shall rule all the Residue of the Sentence : So that by Entry of a Stranger on the Lessee, without Procurement of the Lessor, the Obligation is not forfeit. *Dyer 255. Pl. 4.*

[*But that*]. A Man assigns a Lease for Years, and Covenants that he had not made any former Grant, or any other Thing by which this Lease may be in any manner frustrate ; [but that] the said Assignee and his Executors, by virtue of this Grant and Assignment, may quietly enjoy the Premisses during the Term, without the Disturbance of him, or any Person. The Words [*but that*] depends upon the former Words, and is not new Matter or Sentence ; and for this, the Entry of a Stranger upon Eigne Titles had not broken the Condition. *Dyer 240. b.*

[*Then next following*]. In Assumpsit about the Communication of the Marriage of his Daughter. The Defendant promised him, That if he would hasten the Marriage, and should have a Son within 12 Months then next following, he would give him 100*l*. He sets forth he did hasten the Marriage, and had a Son within 12 Months after the

Mar-

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Marriage, and had a Verdict: It was moved in Arrest of Judgment, That the Plaintiff had not set forth he had a Son within the Time, for [then next following] shall be referred to the Time of the Communication; but *Cur' contra.* 1 Vent. 262.

[Charges]. If one covenant with another to acquit him of all Charges issuing out of the Land, and after by Parliament the 10th Part of the Value, not of the Issues of all Lands, are given to the King; in this Case, it seems the Covenant shall not extend to this: But if the Parliament had given the 10th Part *exituum Terre*, the Covenant would have extended to this, as well as to Rents, Commons, and such-like Things, wherewith the Land is charged. *Fitzb.* Covenant 2. *Brok.* Grant 164.

[Extunc]. If one Covenant to Levy a Fine at next Assizes for 13 Years *extunc*, this shall be taken from the Time of the Fine levied, and not from the Time of the Covenant. *Cur, Hill.* 7 *Jac. B.C.*

[At all Times]. A Man covenants to make Assurance at all Time and Times, &c.

How [at all Times] shall be construed. *Vide supra.*

[Within one Month]. Covenant was to make farther Assurance, &c. within one Month, when he shall be thereunto required. *Per Cur'*, The Month shall be after the Request, and not within a Month after the Date of the Bond. *Stiles, p. 242. Wentworth's Case.*

[Miles]. Covenant to do a Thing, or not do it, within 4 Miles of Rye. Miles shall be construed 4000 Paces, *Cr. Eliz. 412. Minge and Earle.*

Several

## C H A P. VII.

## Several Sorts of Covenants.

Covenants, { Deed.

viz. { Law.

Covenants, { Affirmative.

{ Negative.

Covenants, { Real.

{ Personal.

{ General.

Covenants, { Particular : And where the  
Particular Covenant shall  
qualify the General.

Covenants, { Joint.

{ Several.

Covenants, { Obligatory.

{ Declaratory.

Covenants, { Mutual : Reciprocal.

{ Distinct, or Several.

Some Covenants are executed, i.e. That a Thing is done already, and some Executory, i.e. That a Thing shall be done hereafter ; and these are good : But if it be of a Thing present, as I covenant that my Horse is yours ; it is void.

There is Difference between Covenants *Declaratory*, and Covenants *Obligatory* : Covenants *Declaratory* serve to limit and direct Uses ; Covenants *Obligatory*, as to enjoy free from Incumbrances, shall never be construed to raise an Use, because they have another Effect. 1 Sid. 27. in *Hore and Dix's Case.*

*There*

There is difference between Covenants in Indentures,  
and in Deeds-Poll ; or,

Who shall be said Parties to the Indenture, so as to  
be charged with it, or to take Advantage of  
it.

If an Indenture of Charter-Party between *A.* and others, Owners of the Ship called *E.* whereof *B.* is Master of the one Part, and *C.* of the other Part ; in which Indenture *A.* covenants with *C.* and *B.* and *C.* covenants with *A.* and *B.* and binds himself for Performance of Covenants in 600*l.* and the Conclusion of the Indenture is, *In Witness whereof, the Parties above-said have put their Hands and Seals* ; and the said *B.* to the said Indenture, put his Hand and Seal, and delivers it. In this Case, *B.* is not any Party to this Indenture, so that *B.* may not release any Action brought upon it, for this is an Indenture Reciprocal between Parties of the one Part, and Parties of the other Part ; in which Case, no Obligation, Covenant or Grant, may be made with any who is not Party to the Deed ; but where the Deed is not Reciprocal, but is without the Words [*Between, &c.*] as, *omnibus Christi fidelibus, &c.* there a Covenant, Grant or Obligation, may be made to divers several Persons. *C. M. Ch. 673.*  
*2 Rol. Abr. 22.*

No Covenant  
or Grant to  
be made with  
any who is  
not Party to  
the Deed in  
Indentures.

*Aliter in a  
Deed-Poll.*

If Indenture of Charter-Party be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants, of the other Part ; and there are several Covenants on the one Part, and on the other ; and *A.* only seals the Indenture of the one Part, and

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One who is Party to the Deed, tho' he never sealed, may join in Action of Covenant.

and C. and D. on the other Part; but in all the Indenture it is mentioned, That A. and B. covenant with C. and D. and C. and D. covenant with A. and B. in this Case A. and B. may join in Action against C. and D. on this Indenture for Breach of Covenant, though B. never sealed the Deed, for he is Party to the Deed, and C. and D. had sealed the other Part to B. as well as to A, upon which the Action is brought. 2 Rol. Abr. 22, Clements and Henly.

Tooker, the Defendant, covenanted with Tooker, his Son, and Anne Slade (one of the Defendants, whom he intended to marry), to give them Meat and Drink in his House; and if any Discontent should happen between the Father and the Son, so that he and his Wife Anne should disagree to dwell with Tooker the Father, then they should have Six Beasts, Gates, &c. Tooker, the Son, died; Anne disagrees to dwell with Tooker, the Father, and marries with one Crabb; who, with his Wife Anne, brings the Action. Per Curia, the Declaration is not good, and the Breach not well assigned, the Case is grounded upon the second Covenant, which consists upon a Contingency; which Contingency is, if there happen any Discord, &c. the Words are joint, and they ought all to disagree: True it is, in some Cases, a Conjunctive shall be taken for a Disjunctive; but this is according to the Matter and Circumstance of the Fact, but in this Case it shall not be taken disjunctively: Also it is alledged in the Declaration, that she disagreed; whereas a mutual Disagreement between all ought to be alledged, and Judgment was, Quer nil. cap. But all agreed, the Wife might

have boarded with Tooker, the Father; but her new Husband could not. *Pop. 204. Crab & Ux. versus Tooker.*

## Covenants Disjunctive.

### Election of the { Covenantor. Covenantee.

Covenant is, That the Covenantor shall pay to the Covenantee, &c. at the Choice and Election of the Covenantee, within a Month after the Death of J. S. 30*l.* or 20*Kine.* Defendant pleads, That the Plaintiff, within the Month after the Death of J. S. did not make any Choice or Election. *Election* It is a good Plea, for the Covenantor is not bound to make a Tender of both, and the *ought to pre-* Election of the Plaintiff ought to precede *cide Tendet.* the Tender of the Defendant. *1 Leon. 69. 70.* *Basset and Kennes Case. Moor 241.*

Covenant to deliver such Obligation before such a Day, or to pay him 10*l.* if he requests it; if he doth not request the 10*l.* the Covenantor ought to deliver the Obligation, for he had not Election till Request made; but after Request made he had Election, which of them he would do. *1 Rol. Abr. 447.*

Defendant covenants to deliver to the Plaintiff before such a Feast, such a Ship and Tackle; or, in Default thereof, to pay at the same Feast such a Sum as J. S. shall value them to be worth. Defendant pleads, before such a Feast J. S. did not value them. On Demur, adjudged *Pro Quer'*; for though the Covenantor hath Election to do the one, or the other, yet the Covenant being for his Benefit,

fit, he ought to provide the Value shall be assessed, otherwise he is to deliver the Goods themselves.

Covenant to pay to *A.* or his Heirs annually 12*l.* at *Michaelmas* and *Christmas*, or to pay to him or his Heirs, at any of the said Feasts, 150*l.* The Covenantor hath Election, yet he ought to pay the 12*l.* Yearly till he pay the 150*l.* and because he did not alledge Payment of the one, or the other, it is a Breach.

Condition of a Bond on Articles : If the Defendant paid the Money according to the Articles of the same Date, that then the Bond should be void, or otherwise it shall and may be lawful for the Plaintiff to enter into the Land covenanted in the Articles, to be settled on the Plaintiff by the Defendant. Defendant pleads, the Plaintiff did enter into the Land. Plaintiff demurs. *Moreton* and *Windham* conceived this a Disjunctive Condition, and in the Election of the Defendant to perform either Part. 2*Keb.* 103, 117. *Ferrers* and *Newton*. *Cur'*, Judgment *Pro Quer'*. *Vide 1 Sid.* 312. *mesme Case*.

Debt on Bond for Performance of Covenants: If the Defendant pleads generally the Performance of the Covenants, and the Plaintiff doth demur generally upon it, without shewing Cause of Demur, Judgment shall be given according to the Truth of the Case; for that Default of Pleading is but Matter of Form, and is aided by *Stat.* 27*Eliz.* But if any of the Covenants be in the Disjunctive, so as it is in the Election of the Covenantor to do the one, or the other, then it ought to be specially pleaded, and the Performance of it, for otherwise the Court cannot

not know what Part hath been performed.

*i Leon. 311. Ogletorp and Hide.*

*Vide Pluiss, Tit. Bonds to perform Covenants, Pleadings.*

*Covenants in the Copulative, and in the Disjunctive.*

The Covenant is, That the Defendant would not take Timber without the Assent or Assignment of the Lessor or his Assigns in the Disjunctive; and in the Breach the Plaintiff chargeth the Defendant with cutting of Timber, without the Assent and Assignment of the Lessor, or his Assigns; so he will compel the Defendant to prove more than he ought, for if he did it with their Assent only, or Assignment only, it had been sufficient; but if the Covenant had been in the Copulative, both had been necessary.

*i Leon. 251. Per Hob. Sherwood and Noan.*

Bond or Covenant, That if the Defendant should work out the 40*l.* (which he owed, &c.) at the usual Prices in Packing, when the Plaintiff should have occasion for himself or his Friends to employ him therein, or otherwise shall pay the 40*l.* then, &c. Defendant pleads, That he was always ready to have wrought out the 40*l.* but that the Plaintiff did never employ him. It's an ill Plea, because the Defendant did not aver that the Plaintiff had any Occasion to make use of him, and for that it was at his Election to have Work or Money; and not having employed him, but brought his Action, that is a Request in Law, and so he hath determined his Election to have the Money. Judgment *pro Quer'.* 2 Mod. 304. Wright and Bull.

Debt on Bond of Covenants, upon the De-

mise of a Mill, by the Plaintiff's Testator to the Defendant for 13 Years, under 8*l.* Rent. The Defendant covenanted for himself, his Executors and Administrators, to leave Mill-Stones upon the said Mill at the Expiration of the aforesaid Term, as good as when he entered, or else to give Satisfaction in Money for as much as they shall be worse, according to the Discretion of the Parties that viewed the same at the first: And Defendant further pleads, *Quod ipse ad finem & expirationem termini prædicti Aliquit duo saxa molaria in & super molendinum præd' quodq; Partes [Anglice, the Parties] qmæ primo inspiciebant saxa molaria que fuerunt super molend' præd' tempore intrationis ipsum Johannis in molend' illud bucusque non agreeaverent quantum duo saxa præd' per ipsum ad expirationem terminis præd' ut perfertur relict' a fuer' pejora quam præd' saxa molaria in & super molendum prædicti præd' tempore intrationis ejusdem Johannis ad inde;* and general Performance as to the other Covenants. Replic', Demand of the Oyer of the Indenture; wherein, *inter alia*, the said Covenant is set forth, and say, *Precludi non,* for that at the Time of the Entry of the Defendant upon the Mill, there were Two Stones, of the Value of 3*l.* and that at the End of the Term the Defendant did not leave so good Stones, nor give any Satisfaction in Money, (*nec dedit aliquam satisfactionem in moneta alicui Persone cuicunq; per tantum quant' Lapidès molar' per eundem (Def.) in eodem molendino relict' fuer' peiores quam præd' Lapidès molares in eod molendino existen' tempore præd' Intrationis ipfis Defendantis.* Et hoc parat', &c. Rejoinder prout the Bar, Demur. The Plaintiff's Council insisted, That it was incumbent upon the Defendant, to procure the Persons who

who had the View of the Stones at the Time of the Defendant's Entry upon the Mill, to have adjusted how much the Stones of the Mill, which were left at the End of the Term, were worse than those which were there at the Time of the Defendant's Entry of the Mill, and for Default thereof, he hath broken his Covenant; for he doth not pretend by his Plea, that he hath left Stones so good as the first were. The disjunctive Covenant is in Advantage of the Covenantor, and therefore he ought to shew the one or the other is performed, and therefore he ought to have procured an Adjustment in the Case; as if a Man oblige himself to resign a Benefice, he ought to procure the Bishop to accept his Resignation. So if a Man is bound to pay 100*l.* or so much as *J. S.* shall appoint, if he will be excused the Payment of the 100*l.* he ought to procure *J. S.* to appoint a less Sum to be paid.

Disjunctive  
Covenant  
is in Advan-  
tage of the  
Covenantor.

To which it was answered by the Defendant's Council, That by the Covenant, he was to leave at the End of the Term as good Stones as were in the Mill at the Time of his Entrance, or to give Satisfaction in Money for so much as they were worth, according to the Discretion of the former Viewers of them, so that the Covenant is in the Disjunctive; and in a disjunctive Covenant, if one Part of it becomes impossible, the Covenantor is excused to perform the other Part, and that this Case is like to Submission to Arbitrament: And for this the Defendant is not bound to procure the Viewers to make any Adjustment in the Case, and they having not made any, and the disjunctive Covenant being for his Advantage, he was entirely excused.

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*Per Cur'*, Conditions are for the Benefit of the Obligor, if possible ; but if impossible, the Obligation is absolute. There is no Impossibility in this Case, if the Viewers cannot be procured to adjust the Damage, yet the Defendant might have left as good Stones at the End of the Term, as were there at the Entrance of the Defendant, which is the other Part of the Covenant ; and this Case is not like Submission to Arbitrament, for by it both Parties oblige themselves to stand to the Arbitrament of the Arbitrators, but none of them obligeth himself to procure them to make an Award. But in this Case the disjunctive Condition being in Advantage of the Defendant, he ought to procure the first Viewers to make Adjudication of the Damages.

*Laughter's Case* is good Law, *s Rep.* but the Reason given there hath been denied. If one bind himself to pay 10*l.* or so much as *J. S.* shall appoint, if *J. S.* will not appoint any Sum to be paid, the Obligor shall pay the 10*l.* If one is bound to make a Lease to *J. S.* or pay him 100*l.* before *Michaelmas*, and *J. S.* dyes before *Michaelmas*, the 100*l.* ought to be paid. And in the Time of *Cb. J. St. John*, a Case was adjudged, and Two of the Judges in it spake with Two of the Judges in *Laughter's Case*, who affirmed, that there was not any such Reason given for the Resolution in *Laughter's Case*. The Case in *St. John's* Time was, A Man covenants, in Consideration of 100*l.* to make a Lease to *J. S.* for his Life, before *Michaelmas*, or to repay the 100*l.* and *J. S.* dyes before *Michaelmas*: Resolved that the 100*l.* should be repaid, *1 Lut. 691. Studholm and Mandall.*

*Covenants*

Covenants { Affirmative.  
Negative.

There is Difference in penning of the Covenant; as if the Lessor covenant with his Lessee, that he shall have sufficient Hedgeboot by Assignment of the Bailiff of the Lessor: By this the Lessee is not restrained from that Liberty which the Law allows him, and therefore he may take without Assignment; but if the Words be negative, that he shall not take without Assignment, or that he shall take by Assignment and not otherwise, *contra Dier 19.*

P. brought Covenant against the Defendant, on Covenant that he shall go in such a Ship out of the River of *Thames* to such a Place in *Spain*, and the Words of the Covenant were, *Quod decederet procederet & non deviet*. Defendant pleads Performance generally; *per Cur'*, the Plea is not good, and this \*Diversity is taken between a negative Covenant, which is only in Affirmance of an affirmative Covenant Precedent; and a negative Covenant which is additional to an affirmative Covenant, as here; for in the first Case, Performance generally is a good Plea, but in the last not, but he ought to plead specially; and in this Case the Defendant might have departed, proceeded and gone to *Africa*, or to the *West-Indies*, if he had not been restrained by the negative Covenant, *& non deviet*.

*Sid. 87. Langbill and Palmer.*

+A negative Covenant, as that he shall not use a Trade, *in consideratione inde*, Defendant promiseth him 100*l. per Annum* during Life: This doth not amount to a Condition Precedent (but is mutual), for then the Plain-

\*Diversity between a negative Covenant, which is only in Affirmance of an affirmative Covenant, and a negative Covenant which is additional to an affirmative Covenant.

If the Covenant of the one Part be negative, and the affirmative Covenant of the other Part be *in consideracione performance inde*;

tho' the negative Covenant be broken, yet the affirmative Covenant ought to be performed.

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tiff shall never have the 100*l. per Annum* during his Life; for it is not possible for the Plaintiff to perform his Covenant in his Life, for at any Time during his Life he may break it; and a negative Covenant is not said to be performed until it becomes impossible by the Breach of it, which Impossibility may not happen but by the Plaintiff's Death, 2 Sand. 155, 156. *Humlook and Blacklow.* 1 Mod. 64. 2 Keeb. 674.

Debt on Bond for Performance of Covenants; One whereof was, That the Defendant should not deliver up Possession to any but the Lessor, or such Persons as should lawfully recover. The Defendant pleads, he did not deliver but to such Persons as lawfully recovered it. *Twisden* said, he ought to shew he delivered to *J. S. per lawful Title*; but on the other Side it was said, the Bar is pursuant to the Count; and *Twisden* conceived in affirmative Covenants general Pleading-Performance is sufficient, and so on negative; for it is sufficient for the Defendant to plead an Excuse, and the Plaintiff must assign Breach to entitle himself, *Windam ad idem*, Negative Covenants may enwarp many Particulars; as to say, he did not cut down any Timber, unless to make Bars and Stiles, Judgment pro Defendant, 1 Keeb. 380, 413. *Nicholas and Pullen*, yet 2 Palmer 70. *Ley ver. Lattrell*, *al cont. Vid. infra tit. Pleadings.*

Negative Covenants may  
enwarp many  
Particulars.  
1 Lev. 83.

A negative Covenant is said never to be performed until it becomes impossible to break it, 2 Sand. 157.

*Trespass quare clausum fregit & sepes proster-  
natis*, by the Plaintiff Lessee for Years. Defendants justifie, for that *M.* seised of the Lands let them to the Plaintiff, excepting the

Trees

Trees, and Liberty to root them up, fell them and carry them away, *cum averiss reparando spes & implendo foveas*; and that *M.* afterwards granted the Trees and Liberty to *Arthur*, and that he and the other Defendants, his Servants in Prostration, &c. used this liberty (which is specially pleaded) and justify *que est eadem fractio*. Plaintiff demurs, or that the Defendants have not alledged that they have filled up the Ditches, and mended the Fences according to the Agreement. *Per Cur'*, this is not a Condition, which Not a Condition, but a not being performed, destroys the Agreement and avoids the Liberty; but it is a Covenant, for which the Lessee hath Remedy by Action. And the C. Justice cited Sir George *Nickerstaff's Case*, which was, He covenanted with the Plaintiff that he should quietly enjoy the Land demised, paying the Rent reserved; and it was pleaded there, that the Plaintiff had not paid the Rent according to the reservation. And upon Demur it was adjudged, that the Word [paying] doth not make the Covenant conditional, but that it was a reciprocal Covenant, for which the Party may have Action, *Sir Tho. Jones*, 205. *Warren ver. Arthur.*

Paying the  
Rent makes  
not the Cove-  
nant condi-  
tional.

### C H A P. VIII.

*Mutual and reciprocal Covenants.*

If *A.* lease by Indenture a Messuage to *B.* in Dec. 22 Car. 2. pro Twelve Years, and covenants with *B.* to repair it with all necessary Reparation before Midsummer following; and *B.* covenants on his Part, *Quod ab & post ale tempus quale A. repararet & emendaret præd' messuag' quod tunc præd' B. sufficient' repararet præd' messuag' ad omnia tempora durante termino præd'.*

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*præd.* In Action of Covenant by *A.* against *B.* for Non-reparation of the House after *Midsummer*, he declares, That altho' he had performed all the Covenants on his Part to be performed (without any particular Averment) that he had repaired it before *Midsummer*, &c. yet the Defendant had not repaired after the said Feast. This is a good Declaration, for the Covenant of *A.* to repair it before *Midsummer* is not a Condition Precedent, but only the Time divided and mutual between *A.* and *B.* (*scilicet*) that *A.* shall repair it before *Midsummer*, and *B.* after during the Term, for which each of them may have Remedy by Action against the other, *1 Rolls Abr.* 416. *Bragg and Nightingale, Stiles* 140. This is a reciprocal Covenant, and tho' one does not perform his Part, it shall not excuse the other.

Covenant upon a Charterparty, whereby the Master of the Ship covenants to sail with the first fair Wind to *Barcelona*, and that the Mariners shall attend with a Boat to relade the Ship, and then to return with the first fair Wind to *London*, and to unlade and deliver the Goods; and the Merchants Covenant to pay so much for Freight, and so much for Demurrage every Day. And the Master brought the Action for the Freight, and for Demurrage, and declares he sailed such a Day with the first fair Wind, and upon all the other Points. Defendant *quoad* *Freight* pleads, that the Ship did not return directly to *London*, but went to *Alicant* and *Tangier* and made diverse Deviations, and by such Delays the Goods were spoiled. And *quoad* Demurrage, that this was occasioned by the Negligence of the Mariners in not attending

Not a Condition Precedent, but reciprocal.

tending with their Boat to relade the Ship. Plaintiff demurs, and had Judgment, for the Covenants are mutual and reciprocal, and each one shall have his Action against the other, but shall not plead the Breach of one in Bar of the other ; and perhaps the Damage on the one Side and the other are not equal, ergo not pleadable in Bar the one of the other ; but each one by his Action shall recover against the other the Damage certain for him, 3 Lev. 41. Cole and Sballer. And so the Case of Shower and Cudmere, Sir Thomas Jones 216.

Breach of one Covenant,  
where not to be pleaded in Bar of the other.

Where in mutual Covenants the Words, *In consideratione performanceis inde*, shall make a Condition Precedent or not, 2 Sand. 156, 157. The Lord of a Mannor covenanted to assure the Freehold to one of his Copyholders and to his Heirs, and the Copyholder, in Consideration of the same Covenant performed, promiseth to pay a certain Sum of Money ; the Copyholder is not bound to pay the Money, unless the Lord first perform his Covenant. *Aliter*, If the Covenant on the Part of the Copyholder had been in Consideration of the Covenant to be performed, cited in Sanders, *ut supra*.

Words [*In consideratione inde*] shall make a Condition Precedent or not,

If the Covenant of the one Part be Negative, and the affirmative Covenant of the other Part be, *in consideratione performanceis inde* ; altho' the negative Part is broken, yet the affirmative Covenant ought to be performed, 2 Sand. 156, 157.

In Assignment the Plaintiff declares, that he was possessed of a Term for eighty Years, and it was agreed between him and the Defendant, that he should assign all his Interest herein to the Defendant, who *prinde* should

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pay 250*l.* and that he promised, that in Consideration that the Plaintiff at his Request had likewise promised to perform all on his Part, that he would perform all on his Part; and then sets forth, that the Defendant had paid a Guinea in Part of the said 250*l.* and that he (*viz.* the Plaintiff) *obtulit se* to assign the Premises to the Defendant by Indenture, which was written and sealed, and would have delivered it to him; but he refused, and assigns the Breach in Non-payment of the Money. Defendant demurs, for that the Assignment ought to precede the Payment, and that it was not a mutual Promise; It is that the Plaintiff is to assign, and the Defendant *proinde*, which is as much as to say, *pro assignatione*; like Case, *Colt Ughtred's Case*, and *Dyer* 16. *b.* But *per Cur'*, it is a mutual Promise, and that the Plaintiff need not to aver the Performance; and it is as reasonable that the Plaintiff should have his Money before he make the Assignment, as that the Defendant should have the Term assigned before he paid the Money, *2 Mod. 33. Smith and Shelberry.*

In mutual Promises the Defendant need not aver Performance.

It is said, If one Covenant to serve me a Year, and I covenant to pay him 10*l.* for it; in this Case, albeit he doth not serve me, I must pay him 10*l.* for it; but if I covenant to pay him 10*l.* if he serve me a Year, *contra*, for there I am not bound to pay him the Money unless he serve me a Year. So if one covenant to make new Pales, so as he may have the old; in this Case it seems he is not bound to make the new Pales, unless he may have the old ones. So if one covenant to pay Money for Service, Counsel, or the like; or covenant to marry ones Daughter, or make an Estate, and the Covenant is penned conditionally,

ditionally, so as one Thing is the Cause of another, and is not set down by mutual and reciprocal Covenants; in all these Cases, if the Cause or Condition be not observed, the Covenant shall not be performed.

*Knight and Keech, p. 3. Will. & Mar. B. R. Rot. 374.* The Case was, There were mutual Promises and Agreements between the Plaintiff and Defendant, which were specially set forth in the Declaration, in which the Plaintiff alledged generally, that the Defendant *non performavit agreementum suum praedictum,* without shewing a particular Breach. There was a Verdict and Judgment for the Plaintiff in the *Common-Pleas*, and now a Writ of Error brought; and it was assigned for Error, that the Breach was too general, which being Matter of Substance, the Right of the Action could not be tryed, and therefore it is not within any of the Statutes of Jeofailes. Many Cases were put to shew, that *non performavit agreementum* could not be good, without shewing wherein, as *Co. El. 292. Hob. 67. 2 Cro. 503.* but Judgment was affirmed upon these Authorities following, (*viz.*) *3 H. 6. 8. Dier 297.* Debt was brought upon a Lease, in which the Defendant was bound to perform several Covenants, or otherwise to forfeit so much, &c. The Breach assigned was, that he had broke all the Covenants, and did not shew any particular Breach, yet held good.

If Promises are Executory on both Sides, Performance need not be averred, because it is the Counter-Promise, and not the Performance that raises the Consideration; and therefore where the Plaintiff promised to deliver a Cow to the Defendant, and he promised to pay him 50 s. the Plaintiff need not

not aver the Delivery of the Cow, because without such Averment a Promise against a Promise made at one and the same Time is a sufficient Ground for an Action, and for a later Authority, 2 Sand. 351. There was an Agreement between the Plaintiff and Defendant, that the Plaintiff should pull down old Walls and build a Malt-House, and that the Defendant would pay him 8*l.* *pro labore suo*; the Plaintiff averred, that after the Agreement *parat' fuit & obtulit performare*, &c. he had a Verdict, and this was held good enough after a Verdict, without averring Performance of the Work. Upon these Authorities, and for that the Promises in this Case were mutual, the Breach was held to be well assigned, and Judgment *pro Quer.* 4 Mod. 188.

The Case of *Ware and Chappell*, cited 2 Mod. Rep. 75. *Ware* was to raise Five hundred Soldiers, and bring them to such a Port, and *Chappell* was to find Shipping, for which he sued upon the Covenant, tho' the other had not raised the Soldiers; for that can only be alledged in Mitigation of Damages, and is no Excuse for the Defendant; and it was adjudged that this was not a Condition Precedent, but distinct and mutual Covenants, upon which several Actions might be brought, 2 Mod. 75. *Stiles Rep.* 186.

In Covenant upon a Charterparty, the Plaintiff declares, that it was agreed that his Ship shall be ready and provided with a sufficient Crew, Tackle, &c. for a Voyage to (*Novellvill*) *in partibus trans Marinis*, upon the 12th Day of *August*, and there should lade with Figs and other Merchandises of the Defendant's, and should bring them back to

*Topfall*

Not a Condition Precedent, but distinct and mutual Covenants.

*Topsall in Com' Devon*, and that the Defendant covenanted to pay 3*l.* 15*s.* for every Tun so brought, and assigns the Breach in Non-Payment of 112*l.* 10*s.* for Thirty Tun; To which the Defendant pleads, that the Ship was not ready, &c. the 12th of August, by which he lost the Profit of his Merchandise. Plaintiff demurs. *Per Cur'*, the Plea is not good, for these are reciprocal Covenants, & utraq; pars hath Remedy for Non-Performance. Judgment pro Quer', Sir Tho. Jones 216. *Showre and Cudmore.*

If by Charterparty G. and Three others covenant with P. and C. to let to freight a Ship, wherein they are Owners to the said P. *pro usu & ex parte* of one B. for a Voyage *modo & forma sequenti*. G. and the other Three covenant with B that the Ship shall go to Lyn and shall take such Freight, and then to Yarmouth, and from thence to Gincbego, and thence to return to the Thames. And C. covenants with G. and the other Three, that B. shall cause Lading to be put into the Ship at Yarmouth, Gincbego, &c. within so many Days, and covenants that the said B. shall pay to the said G. and the other Three *per tota transfretatione* 147*l.* at such a Day. G. and the other Three may have Action of Covenant against C. for the Non-Payment of the 147*l.* without Averment of the Performance of the Covenants on their Part, for this is not a Condition Precedent, but a Covenant distinct of the other Part, 1 Roll. Abr. 414. *Gurnel and Clark.*

If in Articles of Agreement made between A. on the Behalf of B. and C. in which A. covenants, that B. for the Considerations express'd in the Deed, shall convey certain Lands

**Tho' the Land be not assured, yet he is bound to pay the Monies.**

**Agreement to pay 20*l.* for an House, [pro] doth not make a Condition Precedent, but it's a mutual Covenant.**

Lands to *C.* in Fee, and after *C.* covenants on his Part, for the Consideration aforesaid, to pay to *B.* 160*l.* In this Case, tho' *B.* doth not assure the Land to *C.* yet *C.* is bound to pay the Money for the Assurance of the Land. It is not a Condition Precedent, but a distinct Covenant, *i. Rel. Abr.* 415.

Debt upon a Deed-Poll, concerning the Purchase of Land made by the Defendant of the Plaintiff, where the Plaintiff declares, that by the said Deed it was agreed between the Plaintiff and Defendant, that the Defendant should pay to the Plaintiff so much Money upon such a Day for the Land, which he hath not done. Defendant demurs upon the Declaration, for that the Plaintiff doth not aver that the Defendant enjoyed the Land; and where there is not a mutual Remedy, the Deed not being by Deed indented, there ought to be such Averment, *i. Rel. 518. Holder and Taylor.* Where Lessee for Years covenants to repair, provided that the Lessor find great Timber, there in Action of Covenant the Plaintiff ought to aver he offered great Timber, *5 Rep. 78. Gray's Case.* But *per Twisden, Justice*, in one Case, the Words were, The Plaintiff putting the House in Repair, the Defendant covenanted to keep it so repaired, and resolved that they were mutual Covenants, *Cr. Jac. 645. Slater and Stone, Stiles 140.* And in the principal Case it seemed a Covenant by it self, and the Plaintiff had Judgment. But the Defendant brought a Writ of Error. *Q. Raym. 183. Pordage and Cole, El. 1. Sand. 319. mesme Case.* The Court held in the Case of *Pordage and Cole* to be a mutual Covenant; and if the House was not conveyed before the Day, as

it ought to have been, the Defendant may have Action of Covenant for the House; for it is to be intended, that the Plaintiff seals to the Defendant another Part *per the Words [have mutually set their Hands and Seals]*, it was demurred upon the Declaration: Judgment *pro Quer.* and affirmed in *Cam' Scacc'* upon Error brought, 1 Leon. 274. *mesme Case.*

The Covenant was to make a Lease, and the Breach assigned in the not accepting the Indenture by the Defendant. *Per Cur'*, this is laid as a mutual Agreement that the Plaintiff should demise; which must be intended as to the Defendant, that he should accept. Judgment *pro Quer.*

Debt on Bond to perform Articles: The Plaintiff covenants to assign over his Trade to the Defendant, and that he should not take away any of his Customers, and in Consideration of Performance thereof, the Defendant covenants to pay the Plaintiff 60*l. per Annum* for Life; and pleads, that after the Agreement the Plaintiff before any Thing done did work to J.S. a Customer. Plaintiff demurs; \* On Breach Judgment *pro Quer.* This is not a Condition either Party Precedent, but these are mutual Covenants. The Plaintiff need not stay to wait for Performance, perhaps then he may stay as long as he lives; but as on Bonds of Arbitrament on \*Breach, either Party hath Remedy, 2 Keb. 674. 1 Mod. 64. 1 Sid. 464. 2 Sand. 155. *Humlock and Blacklow.*

In Action on the Case, on Agreement that the Plaintiff pull down and build a Malt-house, and that the Defendant was to pay 8*l. pro Labore*: In Consideration of which mutual † Promise the Plaintiff *obtulit* to perform all on his Part, yet the Defendant had

<sup>t</sup> Mutual Agreement, that the one shall build an House, and the other shall pay 8*l.* for the building, and saith he offered to build the House, but saith not that the other hindered him.

not paid; (but he doth not say the Defendant refused the building.) Tho' this be a mutual Promise, yet the Contract imports that the building must be precedent, therefore this Refusal should be alledged, it's a mutual Covenant only; had it been to pay *post reparationem factam*, the Reparation had been a Condition Precedent; had the Workman agreed to build, and the other agreed to pay, they had been mutual Promises. But Agreement to pay 20*l. pro labore*, or in Consideration of Building; these are precedent. Had the Suit been *pro 8 l.* being as a mutual Promise, Judgment should have been *pro Quer.* and *pro labore* alters not the Case; and general Performance, or *obscrit* after a Verdict, as here, implies Refusal; and where the Agreement it self makes a Condition Precedent, the Promise to pay it doth not alter it. Judgment *pro Quer.* 2 Keeble 811, 837. Peters and Opill, *vid. Case*, 2 Lev. 23. 2 Sand. 350. 1 Vent. 177.

B. Lord of a Mannor, covenants with his Copyholder to assure to him and his Heirs the Freehold and Inheritance of his Copyhold, and the Copyholder in Consideration of the same performed did covenant to pay such a Sum. *Per tot' Cur'*, the Copyholder is not tied to pay the Money before the Assurance made, and Covenant performed: But if the Words had been, [in Consideration of the said Covenant to be performed,] then he had been bound to pay the Money presently, and he should have his Remedy by Covenant, 2 Leon. 211. Broccas's Case. 3 Leon. 219. *misme Case.*

Plaintiff declares in Covenant, That by Indenture between him and the Defendant, reciting, that there were divers Controversies, &c. for Determination whereof the said Parties did by the said Indenture bind themselves, in Consideration of 12*d.* given to each other, to observe the Arbitration of, &c. to arbitrate, &c. *de & super præmissis*, and the Plaintiff and Defendant mutually covenanted to do several Matters. That the Arbitrator did thereupon afterwards award, and the Defendant did covenant with the Plaintiff, that in Consideration of the Plaintiff's sealing and delivering (at the Defendant's Request) one Part of a Lease for Years (to the Award annexed) for the Rent therein reserved, that the Defendant should pay so much Money for the Tythes: It was also awarded by the said Arbitrator, and the Defendant did covenant that he would be accountable to the Plaintiff for all such Arrears of Rent, Tythes, and Composition-Money for Tythes, as should be arising and renewing upon the said Land, &c. according to such a Value *per Annum*, whereof the Defendant could not lawfully discharge himself. The Plaintiff avers, he hath observed all the Covenants on his Part, &c. and assigns for Breach, that he hath not accounted with him for all Arrears of Tythes and Composition-Money, &c. and that he hath requested him to come to Account, and that he refused. Defendant pleads *Action non*, and confesseth the Indenture; but saith, in eadem Indentura ulterius agreeatrum fuit & provisum, That the Plaintiff should allow and discount upon the Account all Sums of Money for Parson's Dinners at the Request of the Plaintiff, and such other Sums

which he had directly laid out, and that such a Day *paratus fuit & obtulit se, & adhuc paratus est*, to account for all Arrears of Rent, if the Plaintiff would discount, &c. and the Plaintiff refused all such Sums of Money, &c. Plaintiff demurs. *Per Cur'*, it's an absolute Covenant which chargeth him to be accountable, and not if the Plaintiff would allow Parsons Dinners, for it's impossible the Plaintiff can make such Allowance till the Defendant hath accounted; they are mutual and distinct Covenants, and they have each a Remedy upon these mutual Covenants; and the *provisum & agreeatum est*, doth not amount to a Condition, but is a Covenant. Judgment *pro Quer.* 2 Mod. 73. *Dr. Samways verius Eldsby.*

**Mutual Co-  
venants, and  
why.**

**Averment.**

**Mutual Co-  
venants and  
Promises.**

**Where and in  
what Cases  
Averment of  
Performance  
need to be  
pleaded.**

Upon mutual Promises you need not to aver Performance, and an ill Averment of that which need not be averred, hurteth not, 1 Lev. 293. vide *Pordage and Cole*, 2 Keb. 542.

In the Case of *Thorp and Thorp*, the Declaration was upon mutual Promises of Agreement, by which the Plaintiff agrees to release to the Defendant his Equity of Redemption in Two Closes; in Consideration of which the Defendant assumes to pay to the Plaintiff 7*l.* Now the making of the Release, is a Condition Precedent to the Payment of the Money.

The Books vary much, where in Action of Covenant Averment of Performance need to be alledged, and where Promise may be pleaded against Promise, and where each must bring his Action; and therefore the Point is well settled in the said Case.

The Case of *Nichols and Rainbred* was agreed, Hob. 88. to be good Law. There, in Consideration that *Nichols* promised to deliver to the Defendant a Cow, the Defendant promised to deliver to him 50 s. it was adjudged that the Plaintiff need not aver the Delivery of the Cow, because there was Promise for Promise. It's generally true, where there are mutual Promises it need not alledge Performance on the Part of the Paintiff, but then it depends upon the Words of the Agreement, whether it shall be so or not; and certainly one may make the Agreement, so that one shall not be bound to part with his Money until he had a Consideration for it, 15 H. 7. 10. is full as to the Words of Agreement. One covenants to serve me for a Year, and I covenant to give him 20 l. he may sue for the 20 l. altho' he doth not serve me; otherwise if the Agreement had been, that he should have 20 l. if he would serve me for an Year.

There is no Reason that one shall be compelled to pay Money for Performance of an A&t before the Act be done; but here the ensuing Differences are to be noted:

First, If by the Agreement a Day certain Diversities. be appointed for Payment of the Money, and this Day happens before the A&t can be performed, for which the Money is to be paid; there, altho' the Words are, that one shall pay so much for the Performance of such an A&t by the other, yet the Party may have an Action for the Money after the Day appointed for the Payment of it, and before the A&t be done; as Sir Ralph Poole's cited in 7 Rep. in Ughtred's Case: One covenants to serve the other in the Wars of France with

3 Esquires, and the other covenants for this to pay 42 Marks; Action lies before the Service performed. So *Vent. 147. Lary, and Cheshire's Case.* One promiseth, that in Consideration the other will permit him to enjoy such Land for Seven Years, that he will pay him 20*l. pro quilibet Anno*, an Action lies after every Year. Upon the same Reason is the Case of *Pordage and Cole*, *1 Sand. 319.* where it was agreed, that Cole should give to Pordage 500*l.* for all his Land, the Money to be paid a Week after *Midsummer*, and adjudged that Action lies for the Money before that the Land is conveyed.

The other Difference to be observed is, That if a certain Day be appointed by the Agreement, yet if this Day happens after that the Consideration is to be performed, there ought to be Averment that the Service is performed, *Dyer 76.* If a Contract be made between Two, that for an Hawk of the one to be delivered at such a Day, the other shall have his Horse at *Christmas*; if the Hawk be not delivered at the Day, the other shall not have Action for the Horse. There are divers Opinions in the Books upon that which is said in *Ugbred's Case*, which seems to be contrary, and which I shall give Answer to.

*1 Rol. Abr. 414. Gurnel and Clarks in B. C.* Where one covenants with another to pay him 147*l. per tota transfretatione* of a certain Freight, and it was adjudged that an Action lies for the Money without Averment of Performance on the other Part, &c. But in this Case, it appears not whether the Money was to be paid before the Voyage or after; but the true Answer to this Case is, That a Writ of Error was brought upon this Judgment, and

and the Court of B. R. held it to be erroneous, 1 Bulst. 167.

As to *Vivian and Shippings*, in 1 Rol. 415. An Award was made between A. and B. that A. should pay B. 10 l. and in consideratione inde B. shall enter into a Bond to A. to release all his Right in certain Lands (just the principal Case); B. is bound to enter into the Bond, altho' A. doth not pay to him the 10 l. *Resp.* He is mistaken in the Report of this Case, and the Judgment was directly contrary, as appears, 1 Cr. 384. where *Jones and Berkly contra Crok.* That the Payment of the 10 l. is a Precedent Condition; the Case of *Heys and Heys*, cited in *Rolls*, has no such Point, as you may see in 1 Cr. 433.

There is a Case in 2 Mod. *Smith and Sheld-*  
*den*, p. 33. The Plaintiff declares, That in Consideration that he promised to assign his Interest in such an House, the Defendant promised to pay him so much, &c. The Question was, Whether the Plaintiff ought to aver, that he had assigned his Interest in the House; and it was ruled, that he need not make such Averment.

This was adjudged in a Writ of Error,  
Hill. 8 W. 3. Rol. 1667.

*Tenant to have convenient Timber for Reparations,  
by the Appointment of the Bayliff.*

#### Construction.

Trespass upon a Lease of a Farm during Lives, and the Covenant upon which the Question arose was this: The [Defendants] covenant, que J. W. and Jane his Wife, and W. W. eorum filius deberent & vellet de tempore in tempus & ad omnium tempora, &c. bene &

sufficient' reparare, &c. dict' tenement' horrea, &c. in bon' & sufficient' reparatione pro quo proposito [Angl', for which Purpose] liberet & licet' foret pro eo ea vel illis capere super dicta præmissa per appunctuationem & non aliter ballivi dict' manerii pro tempore existen' super raconabil' requisition' fore fact' apt' convenien' marenium [Angl', fit convenient Timber] pro reparatione dict' messuag' & edificiorum si aliquod tale marenium beri vel inveniri posset super dicta præmissa.

(The Trespass was, for cutting down Six Oaks and Six Elms. Defendant justify all, except Five Oaks and Five Elms by Virtue of the Lease by the Plaintiff to them, and recite the Lease and the said Covenant).

That the House was in Decay, &c.

That R. W. the Bayliff, &c. at their Request appointed them to cut down apt and convenient Timber, &c. and so justify being necessary for Reparation.

*Virtute cuius dimissionis præd' (Defendant) in præd' mes' intravere & sic seit' existen' præd' mes' & alia edifica per Indentur' præd' ut prefertur dismiss' fuer' in decasu in marenio eorundem & necessar' reparationibus indigebant videl' apud S. præd' super quo postea scil' (tale Die & Anno) apud S. præd' quidam R. W. tunc existen' ballivus præd' Johannis Talbot (Lessor) manerii sui de S. præd ad requisitionem ipsorum (Defendants) appunctuavit præd' les Deft' succidere & capere apt' & convenien' marenium ad præd' necessar' reparations faciend' virtute cuius quidem appunctuationis præd' les (Defendant) & ac præd' O. O. C. D. & ut servientes (des Deft') ac per eorum precept' die & ann' supradict' in narratione præd' spec' apud S. præd' quinque Quercus & quinque Ulmos in & super præd' dimiss' præmiss' crescen' & existen' apt' & convenien' marenium & sufficien' tantum ad necessar' reparacion' præd' faciend' & non amplius pro eisdem necessar' reparationibus succider' ceper' & asportauer' prout eis bene licuit [and that Part of them was employed upon the Reparation, and that the Residue, quam cit' potuer' scil'*

*uti ad tunc & ibid' progrediebant quosq; præd  
Johannis Talbot operarios prohibuit, &c.] & hoc  
parat'.*

*Replic' precludi non, quia de injuria sua pro- De injuria sua  
pria absq; hoc quod præd R. W. ballivus præd propria.  
Johannis Talbot manerii sui de S. præd ut prefer-  
tur existen' appunctuavit præd Janam W. & J.  
succidere & capere easdem quinque Quercus &  
quinque Ulmos ad reparation' faciend' & hoc pa-  
rat', &c. unde, &c. Demurr' pro causa traversat Demur.  
materiam non traversibilem & non satis apte re-  
spond' materiae plitat.*

Per Cur', the Traverse is ill, for by it is travers'd what is not alledged in the Plea; for the Traverse is, That the Bayliff had appointed the Defendant [Tenant of the Premisses] succidere easdem quinque Quercus & quinque Ulmos. And the Plea is, That he had appointed them succidere & capere aptum & convenien' maregium, &c. Here is a Traverse of a Conclusion, which ought not to be ; the Traverse ought to have been, That the Bayliff did not make any Appointment, or that the Trees were not necessary or convenient.

As to the Plea : It was said, That when Trees are excepted in a Lease (as they are in this Case) and by the Lease a special Authority is given to the Tenant to take the Trees for Reparations, there the Tenant ought to pursue the Authority given to him, or otherwise he is a Trespasser ; but if the Lease is made without any Exception of Trees, then if the Bayliff will not make any Appointment, the Tenant may resort to the general Authority given him by the Law to take that which is convenient. And F. Powell said, that perhaps it was not necessary for the

the Bayliff in this Case to appoint the particular Trees for the Reparations, but he ought to have view'd the Buildings, and upon this to appoint so many Trees for the Reparation of them. *C. J. Treby*; What is not convenient is not to be left to the Judgment of the Tenant; at the Rate of this Appointment the Tenant may take as many as he pleaseth, for the Bayliff had made him Judge of it contrary to the express Words of the Covenant, which are, That the Tenant shall have convenient Timber, &c. by the Appointment of the Bayliff, and not otherwise. The Bayliff had not executed his Authority, and then the Defendant cannot have any Authority, and so are Trespassers; and by the Opinion of the whole Court, Judgment was pronounced *pro Plaintiff*, because the Bar was ill, *i. Lut. 1471. Sir John Talbot ver. Jane Woodhouse & al.*

## C H A P. IX.

*Where the Covenants are distinct or not.*

**I**F *A.* upon a Marriage intended by *C.* his Son with *D.* covenants with *D.* to stand seised, and to make other Covveyance of Land to the Use of *C.* for Life, and after to *B.* for her Jointure for Life, and after to other Uses of their Issues, and so of other Lands, as before, and then *A.* covenants *modo & forma sequentibus*, (viz.) *præd' A. pro & non obstante aliquo actu sive re per ipsum facto in contrarium tempore sigillationis & deliberationis Indenturæ præstabat & legitime fuit seitus ac usq; tales bona & sufficientes conveyanciæ & assuranciæ in Lege forent factæ & Legitime Executæ ut supradict' est steteret & esset seitus de præmissis sibi & hæridibus suis in feodo simplici absq; aliquo genere [Anglice, Manner,*

Manner, Condition, Defeasance, Mortgage, Limitation,] *sive potestatis Revocationis mutare permutare eadē ac insuper quod dicta terra & præmissa præd' antea Limitata pro junctura dicta B. a tempore deceſſus præd' A. pro & durante termīno vita dictæ B. continuarent remanerent & forent eid' B. & assignat' suis plene & clare annue valoris 200 l. ultra & præter omnia onera solution' exitus & reprisas quocunq; and that no Reversion was then in the King. Altho' in this Case this bears Semblance to be one Covenant, for that the Words of Covenant are but once named ; and altho' it be said in the Beginning, he covenants in Manner ensuing ; and altho' the Word [Et] couples altogether, yet the last Part touching the Value, is an absolute, several, distinct Covenant of it self ; so that if the Land limited for the Joinure are not of the Value of 200 l. *per annum*, altho' it is not *per any Act* of her own, yet she had forfeited his Covenant ; and the Words [notwithstanding any Act] do not refer to the said Covenant, but only to the first, and the Value is properly in the Conſiance of the Covenantor ; and it is not proper to say, that for any Thing by him, &c. it should be of such a Value, Cr. Car. 495. Hughes and Bennet. Jones 403. Vid. Cr. Car. 107. Et 1 Baud. 60. 2 Rolls Abr. 249. mesme Case.*

Notwith-  
standing any  
Act, howev-  
er or not,

In a Feoffment the Testator covenants, Notwithstanding any Thing by him done to the contrary, he was feised in Fee-Simple or Fee-Tail, without any Condition or Limitation to determine it. And (2.) That he had Power and rightful Authority to sell. (3.) That the Lands were clear from all Incumbrances. And, (4.) That the Feoffee shall

Notwith-  
standing any  
Thing by  
him done to  
the contrary.

## The Law of Covenants.

shall enjoy against all Persons claiming under him, his Father and Grandfather.

Plaintiff declares, that the Testator had not Power to sell the Land. Defendant pleads, that the Testator, notwithstanding any Thing done by him, had Power to sell the Land. Plaintiff Demurs. By Three Justices against

**Where Covenants are distinct, and where Synonyms.**

*North* : Though the Covenants are distinct, yet the first Two are *Synonyma* and of the same Nature, for if he is seised in Fee he had Power to sell, and it may not be intended, that when by his first Covenant he covenants against his own Act, that immediately by another Covenant of the same Effect he should covenant against all the World ; and the Two subsequent Covenants here are particular and limited, and therefore the middle Covenant shall not be more indefinite and general. But *North* held this absolute and not limited, by Things made by him in the first Covenant, or by him, his Father or Grandfather : As, 1 Cro. Crayford's Case; Covenant, That notwithstanding any Thing done by him he was seised in Fee ; and that no Reversion was in the Crown, and it was of the yearly Value of 300*l.* each one is distinct and absolute, 3 Lev. 46. *Nervin and Muns versus Executors of Finery, Trim. 33 Car. 2. B. C. Rot. 368.*

Debt on Bond, conditioned for performance of Covenants. Defendant demurr'd Oyer of the Condition, and pleads Performance; the Covenants were, That *T. B.* Son of *W. B.* should espouse *A.* the Daughter of *M.* and in Consideration of this Marriage, *M.* covenants to pay 300*l.* *W. B.* covenants to assure such Lands to the said *T. B.* and *A.* for her Jointure, and other covenant for quiet

quiet Enjoyment, &c. And amongst others, *M.* covenants that he will procure the said *T. B.* to be presented, admitted, instituted and inducted into such a Benefice upon the next Avoidance of the said Church, which he did not perform. Defendant demurs upon this Breach assigned, because the Covenant is against Law, being a Simoniacial Agreement: But *per Cur'*, if it had appeared to have been, that in Consideration of the said Marriage, &c. he would procure him to be presented, &c. it had been a Simoniacial Contract, and had avoided the Obligation; but this Covenant depends not on the former Covenants, but a distinct Covenant by it self, and without special Averment, or shewing that it was a Simoniacial Contract, it shall not be intended, *Cr. Car 425. Byrt and Manning.*

A distinct Covenant.

Covenant that he would from Time to Time during the Term, after Three Months Warning, sufficiently repair, and at the End of the Term leave it sufficiently repaired to the Lessor. The last Clause is distinct by it self, he must leave it sufficiently repaired without Notice, *2 Keb. 505, 543, 569. Pomfrett and Rycroft, 1 Sid. 429. 1 Sand. 321.*

A Man assigns a Lease for Years, and covenants that he had not made any former Grant, or any Thing by which this Lease may be in any Manner frustrate, [but that] the Assignee and his Executors by Virtue of this Grant and Assignment may quietly enjoy the Premisses during the Term, without Disturbance of him or of any Person. By Three Justices against one; these Words [but that, &c.] depend upon the former [But that, Words, and is not new Matter or Sentence; &c.] make: and therefore the Entry of a Stranger by <sup>no new</sup> <sub>Matter.</sub> Eigae

## The Law of Covenants.

Eigne Title had not broken the Covenant,  
Dyer 240. Pl. 43. So if the Wife of the Lef-  
for had recovered Dower.

**Distinct Co-  
venants, one  
no Bar to the  
other.**

In Covenant on Assignment of an Oliga-  
tion of *Holl* to the Testator of the Plaintiff,  
and to give a Letter of Attorney to the De-  
fendant to sue, and not to revoke. The De-  
fendant covenants to give Bond to pay 100*l.*  
within a Year, and 400*l.* after. The De-  
fendant pleads, the latter Covenant was made  
in Consideration of the Assignment, and  
that the Plaintiff hath assigned. Plaintiff  
demurs, because these are several Covenants;  
and this is an Averment *Debors*. *Per Cur'*, se-  
veral Covenants or Assumpsits are always in  
Consideration one of another, yet being di-  
stinct, one is no Bar of another. Judgment  
*pro Quer'*, 3 *Keb.* 352. *Johnson and Palgrave*.

*Covenant that he is seized in Fee, &c. had Au-  
thority to sell, &c. Whether several or distinct  
Covenants?*

J. and P. enfeoff the Plaintiff of Lands,  
and they covenant in Manner following,  
(viz.) That J. is seized of a good indefeasible  
Estate in Fee-Simple in this Land, and that he or  
P. had a good Authority to sell, and that there is  
not any Reversion in the Crown by any Act done  
by J. or P. or either of them. The Qu. was,  
Whether these Words [by any Act] shall re-  
fer to all before, or to this last Part only,  
the Two first Covenants being in the Affir-  
mative, and the last in the Negative, as is  
*Ersfeld and Napper's Case*? *Per Cur'*, they are  
several Covenants, *Lit. Rep.* 62, 65, 185, 203,  
80. *Sir George Trenchard versus Hoskins*, 1 *Sid.*  
328. *Gamford versus Griffith*. In Covenant,  
that the Lease assigned to the Plaintiff was

## The Law of Covenants.

95

a fure and indefeasible Lease, and that the Plaintiff should quietly enjoy without the Let, Trouble or Interruption by him; and on Performance pleaded, the Plaintiff assigns a Breach by Entry of a Stranger, to which the Defendant rejoined, it was by Difeisin; and whether this was one entire Covenant or not, was the Question. *Per Cur'*, the latter Words cannot qualify the former, they not being Sense joined together: As on Covenant that the Land is of a certain Value, and that the Covenantee shall enjoy it notwithstanding any Act done by him; this can never be applied to the former Part of the Value. So here the Demise was made before the Assignment, and the Assignor had nothing to do with it, therefore the saying that the Plaintiff shoule enjoy it without the Let of the Defendant, doth not affect the former Part: So was Dr. Caldecott's Case, who purchased Bishop's Land of the Lord *Salisbury*, with just such a Covenant, and he had Relief in *Chancery* thereupon, because the Intent was only to make good his own Assignment, not the original Title. But *per Cur'*, had the Words been, to enjoy notwithstanding any Act, that should have gone to the whole, *Gainsford and Griffith*, 2 Keb. 76, 201, 213. 1 Sand. 58. 1 Sid. 328.

Upon a Conveyance, the Bargainor and his Son, for them and their Heirs, did covenant and grant to and with the Bargainee, &c. that they the said Bargainor and his Son, according to the true Meaning of the said Indenture, were seised of a good Estate in Fee-Simple, and that the said Bargainor and his Son, or one of them, have a good Authority to sell according to the true Intent of the said

said Indenture; and that there was no Reversion in the King by any Act or Acts, Thing or Things, done by him or them. Justice *Hob.* seemed to hold, that they are all one Covenant, and that these Words [by any Act or Acts done by them] do relate to the other Two precedent Sentences ; for if these Words had begun the Sentence, it had been clear, and why not so now? *Hutton* and *Winch* held, they were Three several Covenants. *Hob.* agreed, they were several Covenants in Point of Fact, but not in Point of Obligation, there being not several Words of Binding, *in Com. B. Winch, Treachard and Hoskins.* It seems, that one more of the Judges came over, for it is said, the Judgment was reversed in *B. R.* and that they were several Covenants, and one independant on the other, according to *Rolls 2 Abr.*

250.

If I covenant that I have a lawful Right to grant, and that you shall enjoy notwithstanding any claiming under me : These are Two several Covenants, and the First is general, not qualified by the Second ; one Covenant goes to the Title, and the other to the Possession, by *Hales and Wild, 1 Mod. 101. Norman and Foster.*

Covenant was, that he had good Right Plaintiff saith, he had no good Right. Defendant saith, that the Covenant was *ulterius*, that the Son should enjoy it, notwithstanding any Act done by the Father, and that he did no Act. This latter Covenant doth restrain the former, it is pleaded to be in the same Indenture, all the Parts whereof shall be taken together, as *Nokes's Case, 4 Rep. 81.* and the Particular shall qualify the General. That Covenant

Where a later Covenant doth restrain  
the former.

Covenant being, that the Covenantor *tanquammodo warrantizaret*. And they need not set forth the Indenture, for it is confess'd by the Demurrer, and the Plaintiff desired Leave to discontinue, 1 Keb. 234. *Brownlow's Case*, 1 *Levins* 57.

Sir George Trenchard's Case was reversed in Exchequer Chamber. If a Conveyance of Land be made by A. to B. if A. covenant that he is seised of a good and indefeasible Estate in Fee, and that he had good Power to convey it to B: according to the Indenture, notwithstanding any Act done by him: This last Clause and Covenant shall not restrain the first Clause of the Covenant, (*viz.*) that he had a good and indefeasible Estate in Fee, notwithstanding any Act done by him; but this is absolute and general. And the general Use of Conveyance is to make it so, and the one Covenant independent on the other, 2 *Rol. Abr.* 250. *Sir George Trenchard and Hopkins.*

Several Covenants or Assumpsits are always In distinct Covenants, in Consideration one of another, yet being distinct, one is no Bar of another, 3 *Keb.* 352.

*Sir Tho. Jones* 150. *Kingdon versus Visq. Renelagh and Five others.* Plaintiff, as Administrator to her Husband, brought Covenant in B. C. against the Defendant, and declares upon an Indenture of Nine Parts between the Defendant and her Husband and others, reciting another Deed by King Char. 2. for the farming the Revenue in Ireland to the Defendants, and the Intestate upon farming of which Land all Persons had advanced great Sums of Money, and amongst others the Intestate the Sum of 2950*l.* And upon this (amongst

## The Law of Covenants.

other Covenants) it was agreed, that if any of the Parties died within the Term granted by the King, the Interest should survive and rest in the Survivors, and that the Executors or Administrators of the Party dying shall not have any Benefit or Loss by the Farm after the Death of the Party dying, but that the Survivors should pay to the Executors or Administrators of the Deceased his Share with Interest, and for the Non-payment of the Share, Breach assigned. Defendants confess'd the Covenant as alledg'd, but plead further, that in the Articles there is a Proviso, that the Parties shall not alien, without the Consent of Four of the Partners, their Share or Benefit of the Contract, and then shews that the Intestate, with the Consent of Five of them, aliened his Share, &c. to *J. S.* so that by the Death of the Intestate, *Pars propria seu Interesse* of the Intestate did not come to the Defendants by Survivorship. Plaintiff demurs, and Judgment against him. The Qu. in *B. C.* was, Whether the Assignment pleaded by the Defendants, was an Assignment within the Intention of the Covenants or not?

*Assignment  
of a Share in  
Action good  
in Equity.*

And *per Cur'*, it was. Error was brought in *B. R.* and the Error assigned there was, that the Benefit of the Contract was not assignable, as being merely a Thing in Action. *Per Maynard*; Here is an Agreement for an Assignment Conventional, as of a Share in the East-India Company. It is a good Covenant in Law, and such an Assignment which may be (*Videlicet*) an Assignment in Equity, is by this prohibited without Licence; but another Qu. was, Whether the Action ought to be brought against all? Payment out of the Treasury, may not be made but by all, *Pemb.*

*C. J.*

C. J. the Words [if any dye, &c.] begin A Covenant  
ning a new Covenant and depends not on the former ; and if so, then it is clear the Action ought to be brought against all; as it is, Sir Tho. Jones 150. Raym. 459.

## C H A P. X.

*Covenants joint, or several.*

If the Merchants in a Charterparty covenant with the Owners *separatim*; That one Merchant shall pay 3*l.* and another Merchant 3*l.* and *sic de ceteris*; but the Words are [*Conveniunt Separatim*]. And in the End there is such a Clause, *Et ad performancem omnium & singulorum Conventionum ex parte predictorum Mercatorum perimplend' quilibet Mercatorum predictorum separatim obligat praefat' seipsum Magistro & Proprietariis*, in double the Freight. In this Case, the said Covenants are several by the Words [*Conveniunt Separatim*], and the last Part by which *quilibet eorū obligat seipsum*, &c. refers to the precedent Covenant, where they *Conveniunt Separatim*; and so it is also several, § Rep. 22. *Matherwson's Case.* Tho' the Covenants of the Masters and Owners were joint, yet the Covenants of the Merchants were several; therefore if any of the Sales of the Merchants be broken off, this only avoids the Deed unto him.

If in an Indenture there are Three of the one Part, and Two of the other Part, in which the Two covenant jointly and severally to do a certain Thing ; and the Three covenant also jointly and severally with the Two, after the Performance of the said Thing by the Two, to pay to the said Two a certain Sum for every Particular, &c. And after, these general Words follow (*videlicet*) pro

Joint, and  
not several,  
Qu.

vera & reali performance omnium Articularum & Agreementorum predictorum alternatum utrav; premium predictarum obligavit se Heredes, Executores, Administratores & Assiguratis suis in & subter penalitatem Sexaginta librarum Sterlingorum. The Question was, Whether in an Action of Debt upon this last Clause for the 60 l. the Action may be brought against One of the said Three only? (scil') Whether this be joint and several, as well as the Covenant? *Trin. 1652.* Judgment was given against the Plaintiff, (to wit) that this Covenant was joint, and not several, against the Opinion of *Rolls*, by Three Judges, *a Roll. Abt. 149. Lima and Harris.* The Covenant is joint and several, in as much as the Subject Matter is joint, (viz.) the Freight of the Ship, for and by them all; and the said Words [for every of them] to refer to the Words [severally covenant,] and the first Word [viz. themselves] make it joint.

The Plaintiffs declare, that by Indenture Tripartite, made between T. of the First Part, the Defendant of the second Part, and C. the Plaintiff's Testator of the Third Part; (on Contract with the Lords Commissioners for buying all Prize Brandies which should be condemned by the Admiralty,) and it was declared, that all the Parties had an equal Interest in the Contract: *Et superinde quilibet eorum respectivus pro se Executoribus & Administratoribus suis, & pro eius proprio actu sive actis, & pro tanto quanto ad eum proprium officium [Anglice, Duty] attinebat sed non pro actu sive officio alterius convenit & agreeavit ad & cum altero & alteris eorum respectivis, & ejus & eorum respectivis Executoribus & Administratoribus, &c. per eadem Indens' modo & forma sequent'. That*

6000 l.

6000 l. Stock should be put into a Goldsmith's Hands. That all the Prize Brandies should be bought by them in Partnership upon their joyn't Account. That none of the Parties (during the Time of Partnership) shall sell or trade in Brandy Wines, by himself only, or in Company with any other; but only upon the same joint Account. That the Monies received by any of the Parties shall be paid in to the Goldsmith, no Advantage of Successorship, and Account to be given to the Executors, &c. Breach, That the Defendant, during the Partnership, without the Assent of T. and C. sold Seventy Tuns of Brandy which came to his Hands, *Virtute contract p<sup>re</sup>dict*, to Persons not known to the Plaintiffs. 2. That the Defendant had merchandized and traded with Two hundred Tuns of Brandy, *pro computo suo proprio & non pro juncto computo pertinet ad Indentura p<sup>re</sup>dict*, *contra formam & effectum Indenturam p<sup>re</sup>dict*. 3. That he had received several Sums of Money, and had not paid them into the Goldsmith. 4. That he had not given Account to the Plaintiff's Executors, &c. Upon Judgment by Default, Writ of Enquiry of Damages awarded, and Damages entirely assed. Exceptions to the Declaration upon the 2d Breach, because he shews not whether the said Two hundred Tuns of Brandy were Prize Brandy, received upon the joint Account, or others, for the Defendant might trade with Brandy Wines upon his own Account, and this ought to be shewed in particular; for if they were Prize Brandies, then Part of it is comprised within the first Breach of selling Seventy Tun; and so for this Uncertainty, the Damages being entirely assed,

self'd, it's ill. 2. The Covenant is joint with the Plaintiff's Testator, and with the said T. who survived the Plaintiff's Testator; for tho' the Covenant is joint and several in

**Joint Interest** makes a joint Covenant. **the Words**, yet the Interest and Cause of Action is only joint, for it's equal Damage to C. and T. if the Covenants be broken, and so they ought to have joined in the Action; and C. being dead, the Action survives to T.

as in 5 Rep. 18 b. *Slingsby's Case*. *Per Cur'*, the Declaration ill for both Points, 1 Sand. 154, 155. Conveyance of a Rectory to Two, and covenants with them [*Et eorum altero*,] that the Covenantor was *Legitime seifus* of the Rectory; they both ought to join in the Action, because the Interest of the Covenantees is joint, 1 Sand. 153. 5 Rep. 18 b.

Indenture Tripartite was between Three.

**Covenant with them** [*Et quolibet eorum*.] A. was one of them, and he covenanted with them [*Et quilibet eorum*;] and the Covenant was, That the Land which he had aliened to one of them was discharged of all Incum-

brances; and he to whom the Alienation or Limitation of the Land was, brought Covenant sole: *Per Cur'*, it ought to be brought by both. The Covenant was with F. G. and F. W. [*Et cum quolibet eorum*,] these Words do

not make the Covenant to be several, so is *Beckwith's Case*, 5 Rep. One covenants with Four, that he was lawfully and sole seised of the Rectory of A. and Two of the Four bring the Action of Covenant; and the Opinion of the Court was, that it lies not, for the other Covenantees ought to have joined

not notwithstanding these Words, [*Et ad & cum quolibet eorum*;] and as to these Words, this Diversity was agreed in *Slingsby's Case*, 5 Rep. When it appears by the Covenant, that every

Diversity where the Words [*Et cum quolibet eorum*] make the Covenant several or not,

of

of the Covenantees hath, or is to have several Interest or Estate : These Words, *Et cum quolibet eorum*, make the Covenant several, in respect of their several Interests. As if a Man by Indenture demise to *A. Blackacre*, to *B. Whiteacre*, and to *C. Greenacre*, and covenants with them, [*Et quolibet eorum*] that he is lawful Owner of all the said Acres ; in this Case, by these Words, [*Et quolibet eorum*] the Covenant is made several ; but if he demise the Acres to them jointly, then these Words [*Et cum quolibet eorum*] are void ; for a Man by his Covenant (unless in respect of several Interests) may not make this first joint, and then to make it several by these or other Words. And altho' divers Persons may bind themselves, [*Et quemlibet eorum*] and so the Obligation shall be joint or several at the Election of the Obligee ; yet a Man may not bind himself to Three, and to every of them to make it joint or several, at the Election of the several Persons for one and the same Cause, for the Court should be in Doubt for which of them to give Judgment, *5 Rep. 18, 19.* And to this Purpose, and for the same Reason, it's said in Justice Windham's Case, *5 Rep.* Joint Words of the Parties in Where joint- Construction of Law, shall be taken severally and respectively. 1. Sometimes in re- Words shall be taken severally. spect of the several Interests of the Grantors, as if Two Tenants in Common join in a Grant of one Rent-Charge, this is several. 2. Sometimes in respect of the several Interests of the Grantees, as a joint Covenant shall be taken severally, in respect of the joint Interest of the Covenantees.

## The Law of Covenants.

No joint  
Interest.

The Defendant covenanted, that he would not agree to take the Farm of the Excise for the County of York, without the Consent of the Plaintiff and another. The Plaintiff alone brought this Action ; and the Breach was, that he did agree to take it without his Consent, and 1000*l.* Damages given by Verdict. *Per Cur'*, here is no joint Interest, but that each of the Covenantees might maintain an Action for his particular Damages : *Vid. 2 Mod. Rep. 82.*

Covenant upon a Charterparty, between *Bolton* Owner, and *Lee and Morgan* Merchants, Freighters of a Ship, by which *Bolton* put to freight to them the Ship in a Voyage to *Guiney*, at 48*l.* per Month, and there were mutual Covenants between the Parties, (*Et quemlibet eorum modo sequent'*, &c.) Exception was taken to the Declaration, because the Action is brought against one of the Merchants, only upon Breach of a Covenant, omitting the other ; and the Covenant is between the Parties by mutual Covenant. And the Covenant by them, [*Et quemlibet*] doth not make it Disjunctive between each Party of each Part, but leaves it a joint Covenant of the one Part, and several of the other, as the Duty is, which ought to be paid by both the Defendants, each having equal Benefit, [*Et quemlibet eorum*] shall be referred to the Plaintiff only, who is the sole Party of this Part ; the Covenant was to pay Freight, which the Defendant had not paid. *Per Cur'*, [*Non allocat'*] the Covenant being between them [*Et quemlibet eorum*] it is joint and several of each Part, *2 Lev. 56. Bolton and Lee.*

Covenant be-  
tween them,  
[*Et quemlibet  
eorum*.]

The

The Covenant is for Three jointly and Covenant for severally, that they shall pay, and the Breach Three jointly and severally, that the Defendant did not pay; per Dodderidge, he ought to aver, not any of them to pay, if Action be brought against one, the others. *Cur' contra*, the Difference is, If the Action had been brought against all, then against one, the Non-payment shall be alledged in all; but when the Action is brought against one only, it sufficeth to say, that he did not pay; and if any of the others paid it, it shall be properly pleaded by the Defendant, *Pelmer* 398.

## C H A P. XI.

*Covenants Personal or Real.*

**R**EAL Covenants are, where a Man doth bind himself to perform a real Thing, as to pass Land by Fine, or when it runs in the Reality so with the Land, that he that hath the one is subject to the other; and so a Warranty is called a real Covenant.

Covenant Personal. When it runs in the Personality and not with the Land; as when a Man covenants to do any personal Thing, as to repair, &c. and yet this runs with the Land to the Assignee. *Vide infra.*

Some Covenants are inherent as it were, or conversant about the Land or Estate; as for quiet Enjoyment, Repairs, not to alien, to pay Rent, to make further Assurance, &c. these shall run with the Land in whose Hands soever they come.

Other Covenants are called collateral, because they do not immediately concern the Thing granted. As to pay a Sum of Money in grols, to build upon another's Land, to give other Security to perform Covenants.

You

## The Law of Covenants.

You will find this Difference much in Use,  
in Respect of Assignments. *Vide infra.*

*What shall be accounted real Covenants that run  
with the Land, or shall affect the Assets only.*

English Bill in Exchequer was brought to subject the Defendant's Lands to the Payment of a Fee-Farm Rent; for that the Duke of Norfolk, who had in his Hands both the Plaintiff and Defendant's Lands, subject (*inter alia*) to the Payment of this Rent, had granted the Plaintiff's Lands unto one under whom the Plaintiff claimeth, and covenanted, that these Lands should be discharged of the Rent; upon which Covenant the Plaintiff sought Relief, and would have it to be as a real Covenant running with the Land, and charge the other Land with the whole Rent; but *per Cur'*, it is no more than an ordinary and personal Covenant, which must charge the Heir only in respect of Assets, and not otherwise: And the Bill was dismissed.  
*Hard. 87. Coke versus Earl of Arundel.*

Covenant,  
that the  
Lands shall be  
discharged of  
the Rent.

Covenant to  
repair Copy-  
hold Estate.

By Grant of  
the Reversion  
the Law  
transfers the  
Covenant of  
the Lessee.

Covenant to repair a Copyhold Estate runs with the Land, assigned by Common Law; and Assignees of the Reversion of Copyhold Lands shall be within the Statute of 32 H. 8. cap. 34. *Vid. Lev. 3d Part, 326. Glover and Cope.*

Where by the Grant or Devise of the Reversion, the Rent reserved upon a Lease for Years is well transferred to the Grantee; the Law also transfers the Covenant of the Lessee to him for the Payment of it, as incident to the Rent. *2 Sanders 371.*

Upon

Upon a Real Covenant there is but Reme-  
dy 4 Ways.

1. By Rebutter.
2. By Voucher.
3. By *Warrantia Charta*.
4. By Aid-Prior.

Feoffee with Warranty makes a Lease, Lessee may not vouch; so he that comes in the Post shall not vouch. *Aliter in Covenant Personal.* 1 *Rol. Rep.* 26. 81. 5 *Rep. Spencer's Case.*

## Covenants that run with the Land Estate.

Covenant for quiet Enjoyment. The Assignee shall have Action of Covenant without shewing the Deed of the first Assignment, for it is a Covenant that runs with the Estate, *Cr. El. 436. Noke's Case*, and the Executors or Husband, who is Assignee in Law, shall have the Benefit of such a Covenant.

Assignee shall  
have Benefit  
of such Core-  
nant.

If I covenant with J. S. and his Heirs to make a Conveyance to one and his Heirs, his Heir may not have Covenant, because it is a Sum in gross; but otherwise, when such a Covenant is in another Conveyance, and goes with the Estate. As if I covenant with A. and his Heirs to convey Land to him and his Heirs; there the Feoffment shall be to the Heir, for the Heir shall have the Covenant. *Palmer 558.*

Where the  
Heir shall  
have the  
Covenant.

*Declarat'*, That the Defendant enfeoffed his Testator in certain Lands, and that he covenanted for him and his Heirs, That he was seized of a good Estate in Fee, and he al-  
ledged

Covenant brought by the Heir, and not by the Executor.

Tenant per Stat. &c. shall have Covenant, as a Thing annexed to the Land.

What Grantees shall be quasi appurtenant to the Land.

Covenant against Assignee of Part, because it runs with the Land.

ledgeth the Breach. *Per Cur'*, The Covenant being made with the Heir, the Executor shall not have the Action, for the Covenant is annexed to the Land. *Winch. p. 19. Bull and Lester.*

Tenant per Stat' Merchant, Staple, *Elegit* of a Term, and he to whom the Lease for Years is sold by force of any Execution, shall have Action of Covenant in such Case as a Thing annexed to the Land, although they come to it by Act in Law. *5 Rep. 17. in Spencer's Case*; as,

If a Man grant to Lessee, That he shall have so much Eftovers as shall serve to repair his House, or shall burn within his House, and the like, during the Term: This is appurtenant to the Land, and shall run with it as a Thing appurtenant, in whose Hands so ever it shall come. *Ibid.*

Lessee of Two Houses in London covenants for him and his Assigns to repair the Houses; Lessee assigns one of the Houses and Parcel of the Land to J. S. and the First Lessor, for not repairing the House assigned to J. S. brings Action of Covenant against J. S. The Action lies, for this Covenant runs with the Land. *Sir W. Jones 245. Coven and Kemise.*

## CHAP. XII.

### Covenant concerning Payment of Money. Place and Time.

**A**ction of Covenant on Indenture, for Payment of Money at a certain Time; Defendant pleads Payment at the Time, and upon this Issue was joined *pro* Defendant. Plaintiff moved in Arrest of Judgment, for that

that the Issue was misjoined, because the Place of Payment was not alledged, which is material and so there can be no Judgment. It was said on the other Side, it is not material to alledge a Place of Payment, because it is a Personal Action, and it shall be intended where the Action is brought, *1 Ed. 5. fol. 3. Rolls.* There is Difference between finding the Money paid, and the finding it not paid, *Stiles 172.*

Covenant to pay 10*s.* when *A.* comes to his House, and 10*s.* at the Feast of St. *Michael* and at the Feast of St. *Andrew* then next following 10*s.* These last Sums ought to be paid at the said Feasts or Times, and not at the next Feast after *A.* comes to his House, *1 Rol. Abr. 442. Lett. M. Pl. 4.*

Covenant upon an Adventure to *Newfoundland*, to pay so much Money within Forty Days next after the Ship shall make her First Return and Arrival in this Voyage from *Newfoundland* into the Port of *Dartmouth*, or into any Harbour, Creek or Port, of *England*, where she shall first unlade her Goods. The Covenantor is to pay the Money within Forty Days after the Arrival of the Ship, and shall not have Forty Days after the Unlading of the Goods, for this is not for Freight, but for Adventure; and the Unlading of the Goods is only mentioned to describe the Haven where the Arrival shall be, and not to put a Limitation of the Payment of the Monies to have Forty Days after the Discharge, *Stiles fol. 30. Lee and Cholwick, 1 Rol. Abr. 442.*

A Covenant to deliver Twenty Quarter of Corn on the Twenty ninth of February next following, and that Month had but Twenty eight Days. *Per Cur'*, he is not bound to deliver To deliver Febr. 29. next

## The Law of Covenants.

deliver the Corn till such a Year comes, when February hath Twenty nine Days, and that is Leap-Year, *I Leon.* 101.

If a Man is bound by Covenant or Bond, to pay a Sum of Money at such a Feast and Place, and between certain Hours of the Feast-Day; and before the Feast, at another Place, he pays the Money to the Covenantee, and he makes Acquittance of this: This is a Discharge of the Covenant or Condition by the Acceptance, &c. *Dyer* 122.

Acceptance  
before the  
Day.

Covenant to render and pay 1188 Florins, which then amounted to 33l. 12s. to be paid *Ad solutionem festi Purific'*, called *Candlemas-Day*, next ensuing. The Plaintiff in his Declaration avers, That *Prædictæ solutiones dicti festi Purification'* next, after the making the Covenant according to the Use of Merchants, were the Twentieth Day of February. Defendant pleaded *Non est factum*, and found against him; upon Arrest moved, it was resolved, that Payment amongst Merchants is known to be on the Twentieth of February, and the Judges ought to take Notice of it, and the rather, the Defendant by his Plea confesseth the Declaration to be true in that Averment, *I Brownl.* 102. *Pearson and Pinters.*

Payment  
amongst  
Merchants.

If *A.* covenant the First of May to pay to *B.* 10 l. at the Feast of St. Michael, without saying more, this shall be intended the Feast of St. Michael next ensuing, *I Rol. Abr.* 444 *Leaknor and Smallwood.*

A Covenant that *D.* Deputy-Post-Master of Oxon, for Six Months should pay all such Sums as he received while he continued Post-Master. On Oyer, the Defendant pleads Performance generally. Plaintiff replies, *E.* continued

continued Two Years longer Post-Master, and such a Day received so much, and paid not over. *Per Cur'*, no Action lay, the Six Months being past, and the Continuance after must be on new Agreement; *3 Keb. 45,* 59. Lord *Arlington* and *Merick*, *2 Sand. 411.*

*Place of Payment, or Performance.*

If a Place of Payment be limited by the Covenant, he is not bound to pay it in any other Place, *i Rol. Abr. 445.*

Covenant to pay 10*l.* at *D.* if the Covenantee accepts this, at another Place it's a good Performance, *Ibid. 456.*

C H A P. XIII.

*Covenant to save harmless.*

IF a Man enter into Bond with another for his Debt, with Condition to pay Money at a Day, and the Principal to save him harmless of the said Obligation, and after he pays not the Money at the Day, by which the Bond is forfeited, and the Surety to avoid Suit pays the Monies; the Covenant is broken, and the Court said it is a stronger Case by Reason of this Word [*Discharge*.] *Cranner and Gonersfull*, *H. 14 Jac. B. R. 1 Rolls Abr. 433.* But,

*Covenant to  
save harmless  
from a Bond.*

If *A.* Lessee of a Term rendering Rent, assigns it to *B.* and *B.* covenants to keep *A.* without Damage of all Rents payable to the Lessor, and after *B.* lets Parcel of the Land to *A.* and after the Hay of *A.* is there distrained for Rent-arrear, yet the Covenant is not broken, for that the Distress for the Hay is unlawful, and a Trespass; and the Sufferance of the Rent to be in Arrear without actual Damages,

*Covenant not  
broken by an  
unlawful Di-  
stress.*

## The Law of Covenants.

images, is no Breach of the Covenant, *Rolls Abr. 433. Coop and Pollard.*

Covenant to  
save them  
harmless  
of all Things  
contained in  
the Inden-  
ture, extends  
not to Bond  
of Cova-  
nants.

Shews not  
how he saved  
harmless.

If *A.* and *B.* are bound in an Obligation to perform certain Covenants contained in an Indenture, whereof one is to pay certain Monies, and *C.* covenants with *A.* and *B.* to save them harmless of all Things contained in the said Indenture, and after the Money is not paid according to the Indenture, whereby the Obligation is forfeited; yet it seems *C.* is not bound to save them harmless from the Bond, for it is a Thing collateral to the Indenture, *Scot and Pope versus Griffin, Mic. 5 fac.*

Condition of a Bond, reciting, That whereas the Plaintiff and one *H.* were bound in another Bond for Performance of Covenants; if the said *H.* should perform the Covenants in that Indenture, and should save the Plaintiff harmless of the said Bond, then, &c. The Defendant on Oyer of the Condition pleaded, that *H.* had performed the Covenants in that Indenture, and that he had saved the Plaintiff harmless of that Bond. Upon a general Demurrer the Plea is ill in Substance, both because the Covenants in the Indenture were not set forth, and some of them might be in the Negative, &c. and also, because he hath not shewed how he saved the Plaintiff harmless, *Allen 72. Ellen and Box.*

A Man sold his Land, and covenants to save the Vendee harmless on Request. It was said, If the Land be extended by Force of a Statute before the Request, the Covenant is not broken, for that now the Covenant is become impossible by the Negligence of the Covenantee himself, *Mare 67.*

Covenant was, That the Covenantee, his Heirs and Assigns, shall and may lawfully enjoy and hold a Messuage, &c. without the Let, &c. of the Covenantor or his Heirs, or of every other Person discharged, or upon reasonable Request, saved harmless by the said Covenantor from all former Gifts. Defendant pleads, no Request was made to save him harmless. Judgment *pro Quer'*, because the Defendant hath not answered to all the Covenants, (*viz.*) to the Enjoying of the Lands; for there were Two Covenants, the Enjoying, and saving Harmless, *More N° 797.*

*Fol. 591. Creswel and Holmes.*

Covenant for  
quiet Enjoy-  
ment and sa-  
ving harmless,  
both must be  
answered.

The Covenant was; Whereas *J. F.* claimed to have a Lease for Years of the Manor of *Dale*, made to him by *W.* That the Defendant would keep without Damage from all Claim and Interest to be challenged by *J. F. De tempore in tempus*, during the Years, &c. The Defendant pleaded, That after the making of the Obligation until the Action brought, the Plaintiff was not damnified *Plea, That he Ratione dimissionis.* The Plea is good, for if he were not damnified *Ratione dimissionis,* then he was not damnified by Reason of any *time dimissio- nis.* *Claim or Interest, 3 Lev. 118. Braintbwayt's Case.*

### — Of the Pleading.

Covenant to save harmless and indemnify the Plaintiff and his Lands in *Sale*, from an Annual Rent of such a Lease during the said Term. Defendant pleads, *Quod a tempore confection' scrip' præd' butusq; exoneravit & conservavit*, the Plaintiff and all his said Lands from the said Rent, *Et hoc, &c.*

I

Plaintiff

Defendant  
ought to  
shew how he  
saved harm-  
less.

Dubito modo  
execut'.

Plaintiff demurs, he ought to shew *Quomodo exoneravit*, it being a Plea in the Affirmative; had he pleaded *Non damnificat*, it had been good, Cr. *Jac.* 634. *Horsman and Obbins. Wind*

Covenant to save harmless from Suits and lawful Evictions. Defendant pleads Performance. Plaintiff replies, That *J. S.* took out a Writ by *Hab' fac' possession'*, out of *B.R. Debito modo execut'*, and by Virtue thereof entered on the Possession of the Plaintiff, and did expel and amove him. Defendant demurs, Judgment *pro* Defendant, *Debito modo* is not sufficient without shewing Particulars. *Contra* in Spiritual Court. As in Debt for Rent, to say *A.* did demand *Debito modo*, it is ill, the *Hab' fac' poss'* doth always recite the Term of the Judgment, and that must at least be shewed, but not the Title of him that evicted; *per Windham*, 1 *Keb.* 379, 413. *Nicholes and Pullen*, 1 *Lev.* 83.

In Consideration of Promise of 7*l. per Annum* for Five Years, the Defendant promised to save harmless against all; but *P.* the Plaintiff shewed, that one *Mare* entered: Here is no Lease, as there was in the Cases of *Brockham and Cham*, and *Gotier's Case*, *Dyer* 328. *Hob.* 35. And so no lawful Title of Entry need to be shewed, the Debate not being concerning the Title, but only concerning the Occupation, 3 *Keb.* 755. & 2 *Lev.* 194.

*Gregory and Mayo*: In Covenant, that the Defendant was lawfully seised, is intended only as to the Title, and the Covenant for quiet Enjoyment is intended only as to the Possession.

Lessee

Lessee covenanted to build an House upon Covenant to the Land within Ten Years: Lessee assigned build. his Term. Action is brought against the Assignee. Assignee pleads, That the Lessor entered, and had the Possession for Part of the Ninth Year. *Per Cur'*, he ought to have shewed, that he held him out with Force, and would not suffer him to build, (for it may be he entered by Right, for Non-payment of Rent) as indeed it was, *Godb. p. 69, 20. Barker and Fletwell.*

*Covenant to build, &c. Vide Covenant to repair.*

Covenant that he would erect Three Houses upon such Land demised to him, unless he were restrained by the King's Proclamation. Defendant pleaded, That such a Day and Year the King made a Proclamation to restrain Building Plaintiff demurred, because no Place is expressed where the Proclamation was made, and so no *Venue* can be if Issue be joyned thereon; and also, because it is not pleaded to have been *Sub magno Sigillo Angliae*; and of that Opinion was the Court. For Proclamations bind not, unless they be under the Great Seal, and if it be denied, there can be no Issue thereon (but only *Null tell Record*); which cannot be, unless it be pleaded to be *Sub magno Sigillo*, *Cro. Car. 180. Keyly and Manning.*

In Covenant to build an House, *Juxta regulas prescript'* in the *Stat. 19 Car. 2. c.* The Breach was assigned in not covering with Cantilevers with Lead, *Juxta regulas prescript'* in the aforesaid Act of Parliament, to which

## The Law of Covenants.

Where the  
Act of Par-  
liament must  
be averred or  
not.

the Defendant demurred. *Per Twisden*, if should be recited, that the Statute doth so prescribe. *Wild, contra*. This is not issuable, but confessed by the Demurrer, not to be done *Juxta regulas prescripti, in Prædict' actu*; but the other is a sufficient Averment. But *C. J. Hale* gave Judgment, because the very Covenant it self stops to say it was otherways in the Act of Parliament; but were this not the Covenant it self, the Breach were too short, unless it be averred, that the Act of Parliament is to cover with Cantilevers, &c. 3 Keb. *Dix and Long, 142, 151. 2 Lev. 85.*

If *A*. covenant with *B*. to build an House by a Day, and *B*. doth forbid him, and thereupon he forbears to do it; in this Case the Covenant is broken. But if he do by actual Impediment hinder him, or be the Cause why the Thing is not done, then the not doing it is no Breach of Covenant.

*Covenant to pay Money on Procurement of Par-  
don.*

In covenant to pay 1200*l.* on Procurement of Pardon for *Blundell*, who killed the Lord *Taff* in *Ireland*. The Condition of the Articles was, That if *B*. were acquitted or pardoned, they should pay 1200*l.* *B*. was convicted of Manslaughter, and the Penalty pardoned; 900*l.* was deposited in the Hands Sir *John Frederick*. It was pray'd that common Bail might be accepted, this being an odious Contract to be discountenanced: Which the Court agreed as to the Acquittal, being in Effect to stifle Evidence, and embrace Jury; but as to the Pardon alone, it might be less Illegal. But here is no Pardon of the Offence

Offence within the Intent of the Articles, No Pardon but only a Pardon of the Penalty of Conviction, and an Appearance was only granted, 3 Keb. 415. Armstrong and Gold versus Cornwall.

## Covenant to permit.

Where no Act is to be done, but only a *Nm permisit*, he need not plead it specially, *fit or Permisit*, where and not *Permitte* or *Permitit*, is a good Plea. *misit*, where a good Plea.

One is bound to permit his Tenants to use the Common, and that he shall not alter the Course of the Common, *quod permisit*, and that he did not alter, &c. is a good Plea generally, 11 Eliz. Dier 279, Pl. 6.

A Covenant, that the Plaintiff to such of the said Lands as by the Custom of the Country *tunc jacebant friscae*, should have free Ingress, &c. The Defendant pleads, *Quod permisit querentem intrare*, &c. *in Tales terras quales tunc jacebant friscae secundum consuetudinem patriæ*, he need not shew what Lands did lie fresh, 1 Leon. 136. Littleton and Perne. For here is no Act to be done, but a Permittance, and it was in the Negative and a not Disturbance, in which Case Permission is a good Plea.

*L.* covenants with *S.* that he would suffer him and his Assigns to have free Ingress, &c. into his House and Shop, without Let or Interruption of the said *L.* And that *S.* *appunctuavit* one *T.* *ut servientem suum in messuagiam*, &c. *intrare*, & *praed' L. expulit*. It was moved in Arrest: 1. It is alledged that *L.* expelled the Servant, but this was the Expulsion of the Master. 2. *Appunctuavit intrare*, and saith not what Time, for perhaps his Licence to enter might be determined. 3. It is not said

## The Law of Covenants.

at what Time he entered, but *Super quo intravit*; but all these Exceptions were overruled, 2 Rol. Rep. 78; Snelling and Low.

A Man makes a Lease for Years, and Bond with Condition, that he shall suffer the Lessee peaceably and quietly to enjoy during the Term, and that without Trouble or Eviction of the Lessor, or any other Person, then the Obligation to be void. *Per Cur'*, the Word [Suffer] shall rule all the Residue of the Sentence; so that by the Entry of a Stranger on the Lessee, without Procurement of the Lessor, the Obligation is not forfeited, Dyer 255.

In Covenant the Plaintiff declared, That he had and held the Office of Chamberlain to the Queen-Dowager, and that by Deed produced in Court, he agreed with the Defendant for the Sale of the said Office, and that the Defendant should hold it with the Consent of the Queen; but by the said Writing the Defendant obliged himself, that the Plaintiff should have, receive and enjoy, (during the Life of the Plaintiff) divers Pensions and Salaries belonging to the said Office, and that the Defendant should receive no Part of them. Then he shews, that the Defendant at his Procurement, and with the Approbation of the Queen, was admitted, and enjoyed it; and Ten Years were in Arrear of a Salary due to the Plaintiff, which the Plaintiff had not received, and the Defendant had not paid him, *Licet sepius requisitus*. Defendant pleads, That he, from the Time of the Agreement to the Time of the Writ brought, permitted the Plaintiff to receive yearly the Profits, according to the said Agreement, *absq; hoc*, that the Defendant re-

ceived any Part of the Profits of the said Office.

*Per Cur'*, the Plea is good, and that upon the Agreement the Defendant was not bound to pay the Money due, but only restrained from intermeddling, *2 Vent. 79. Killegrew's Case.* *4 Mod.*

Plaintiff demised Two Houses in *Mark-Lane*, in the Parish of St. Margarets, *Westminster*, with all Ways, Passages, &c. for Twenty one Years, at 24*l.* Rent. The Defendant covenants, that she would permit at his own Costs to make a Drain, to convey the waste Water from the demised Houses to the main Shore in *Six-Bell-Yard*. He shews he entered, and that the Defendant had broke the Covenant, *eo quod*, That she being possess'd of a Term for Years then and yet to come, of a certain Parcel of Land, and Two Stables, lying between the demised Premisses and the said main Shore in *Six-Bell-Yard*, and by which the Drain ought to run, and then sets forth, the Defendant had assigned all her Term in the said Piece of Ground and Stables to *Tomlinson*, who entered and died possess'd; and *Mary* his Wife, as Administratrix, possess'd her self of it, and married to *Baker*, and the said *Baker* and his Wife *non remiserunt* to make a Drain, but refuse. Defendant pleads, the said Passage being in the demised Premisses, is situate in the Parish of St. James's aforesaid, and leads from the demised Houses in *Six-Bell-Yard*, and such a Drain might have been made, and still may be. And the Defendant did permit the Plaintiff to make a Drain, and the Plaintiff might have done it. Plaintiff demurs.

## The Law of Covenants.

*Per Cur'*, there shall not be Election to make the Passage thro' the Stables, &c. if other proper Ways may be.

But there were Exceptions to the Declaration:

1. There is no certain Place laid for the Houses demised, which are said to be lying and being in the Parish *præd'*, whereas there are Two named before, St. Margaret's and St. James's.

2. The Breach, *Eo quod*, they did not permit, is no positive Affirmation.

3. The Covenant is, That the Defendant, her Executors, Administrators and Assigns, shall permit. And the Breach is laid in the Assignees not permitting, and it appears in the Pleading, that this Assignment was made to *Tomlinson* divers Years before this Demise to the Plaintiff. And this Covenant cannot be extended, but only to the Assignees of the Defendant after the Demise made.

4. It is said, *Quod non permiserunt*, but no special Disturbance, which ought to have been particularly set forth for the Court to judge of.

*Per Cur'*, all these Exceptions but the Second are fatal, especially because the Disturbance is laid to be by an Assignee, who came in before the Demise, 1 Sand. 116 as to the Second Exception, 2 Ventr. 277. *Target and Lloyd*.

## Covenant not to alien or assign.

Lessee for Years covenants with his Lessor, That he will not assign the Land let, nor any Part thereof, without the Lessor's Consent. Lessor enters into Part, Lessee assigns over the rest without Consent; Action of Covenant lies, for it was collateral, <sup>Lessor enters into Part.</sup> <sup>Lessee assigns the rest.</sup> *Stiles 265. Collings and Silly.* And the Covenant is broken, notwithstanding the Lessor's Entry into Part of the Land.

Lessee covenanted, That he will not alien the Advowson let to him without Consent of the Lessor, and shewed he had aliened to J. S. without his Consent. Defendant pleads, he had not aliened without his Consent, and found *pro Quer'*, the Breach was well laid, tho' he hath not laid the Alienation to be by <sup>Alienation</sup> Deed, (an Advowson not passing without <sup>by Deed.</sup> Deed,) for it shall be intended to be by Deed, *Winch. p. 34.*

Debt on Bond, conditioned for Performance of Covenants in a Lease. One was, That the Lessor, his Executors or Assigns, shall not alien without Licence of the Lessor, but only to his Wife and Children. The Not to alien Lessee devileth to his Wife, and makes her his Executrix, who enters therein as Legatee, and takes King the Defendant to Husband, and they alien the Estate. Lessor brings Debt upon the Bond, they pleaded they had not aliened *contra formam Conventionis.* The Plaintiff shews the Alienation abovesaid, and it was thereupon demurred. *Per Three Justices,* the Covenant is broken, for the Feme is restrained from aliening by express Words, as

Where tho'  
there was  
Alienation  
by Licence,  
yet that Af-  
signee cannot  
alien without  
Licence.

Where Ad-  
ministration  
is bound by  
such a Cove-  
nant.

Request.

as well as the Lessee himself, for it extends to the Lessee and his Assigns, and she is Assignee; so tho' there was once Alienation by Licence, yet that Assignee cannot alien without Licence. But *per Walmfley*, the Words are, That the Lessee or Assignee should not alien but to his Wife or Children; and the alien without Wife is not within these Words, for she cannot alien to her self. But it hath been adjudged, that where a Condition within a Lease was, that neither he nor his Assigns should alien without Licence. The Lessee died intestate, the Administrator was bound by this Condition, *Cr. El. 757. Thornbill and Adams ver. King & Uxor, Dyer 152.*

If a Man by Indenture letteth Lands for Years, provided always, and it is covenanted and agreed between the said Parties, that the Lessee should not alien; it was adjudged, that this was a Condition by Force of the Proviso, and a Covenant by Force of the other Words, *Inft. 203. b.*

#### Covenant to render the Possession at the End of the Term.

One seised in Fee of Lands, lets it for Years, and Lessee covenants to render up the Possession to the Lessor, his Heirs and Assigns, at the End of the Term, upon Request. And after the Lessor assigns over the Reversion to Two, and one of them at the End of the Term comes to the Lessee, and demands the Delivery of Possession. Upon this Demand, by one only he is bound to deliver Possession, otherwise he hath forfeited his Covenant; for the Demand of one joint Tenant

Tenant is sufficient for both, 1 Rol. Abr. 428.  
*Linghen and Paine.*

*Covenant to pay all Taxes.*

In Bishops Leases, is not intended of any other Taxes than such as were in Being and Use before, and anciently contained in the Lease, and that was only against Syndals, Procurators, Tents and Subsidies, and not to Charges of another Nature, 3 Keb. 69. *Davenant against Bishop of Salisbury.*

Lease for Years, rendring Rent per Indenture, in which were divers other Covenants, and Lessee bound himself to the Performance of all Payments, Covenants and Conditions in the Indenture ; and in Debt on the Bond, the Defendant pleads Performance and Breach assigned, because the Rent was not paid, no Demand of the Rent was alledged. *Cur' pro Quer'*, because the Defendant had bound himself to perform all, and this by another Deed, which is collateral to the Indenture, otherwise had it been, if it had been in the same Deed. And so is 7 Rep. Maud's Case, *Tracy and Dutton's Case*, and *Payments imply Rents*, (Payments,) Palmer 490. *Polson and Warren.*

Covenant by Lessee to pay such a Rent, (without Words of Reservation) makes this a Rent, 1 Rol. Rep. 80. 2 Bulst. 281.

Bound to perform by a collateral Deed, or in the same Deed, and a Diversity.

What it includes.

## C H A P. XIV.

*Covenants upon Marriage-Agreements.**Construction.*

**U**PON Marriage, the Plaintiff covenants to pay to his Son-in-Law and Daughter 20*l. per Annum*, and upon Demur-  
 Construction of the Words, whether the Question was, If 20*l.* by the Year  
 [20*l. per An-  
 num.*] shall be intended for One Year only, or for their Lives? It shall be for their Lives, and the Maintenance shall be as lasting as the Marriage, 1 Sid. 151. 1 Lev. 102. *Hark and Swaine.* It is in lieu of a Portion, and shall be taken strongly against the Covenantor.

If one covenant to pay 10*l.* to the Covenantee at the Day of the Marriage of the Covenantee, the Covenantee is not bound to give Notice to the Covenantor before his Marriage, at what Day he will be married; but the Covenantor ought to take Notice of it at his Peril, in as much as he hath taken it upon him to pay it at the Day, 1 Rol. Rep. 14 Jac. 355. *Beresford and Goodruse,* 2 Cro. 404. So if it were a Covenant to pay so much within a Year after *B.* shall marry *C.* 1 Rol. Abr. 463. *Stepard and Fry.*

If *A.* seised of Lands in Trust for *B.* covenants with *J. S.* That in Consideration that he would marry his Daughter, that he himself would stand seised of the Land to the Use of *J. S.* for Life, Remainder to *D.* in Fee, the Marriage takes Effect. *J. S.* not having Notice of the Trust, it seems that the

the Estate for the Life of *J. S.* nor the Remainder of *D.* are not subject to the Trust, because that they come in under a valuable Consideration (*viz.*) the Marriage, and have not Notice of the Trust, 2 *Rol. Abr.* 781. Sir George Reynell and Peacock.

In *Affumpſit*, about the Communication of the Marriage of his Daughter, the Defendant promised him, That if he would hasten the Marriage, and have a Son within Twelve Months then next following, he would give him 100*l.* He sets forth, he did hasten the Marriage, and had a Son within Twelve Months after the Marriage, and a Verdict *pro Quer'*, and it was moved in Arrest of Judgment, that the Plaintiff had not set forth he had a Son within the Time (then next following) shall be referred to the Time of the Communication. But, *Cur' contra*, 1 *Ventr.* 262.

If I covenant with a Man, that I will marry his Daughter, and he covenants with me, that for the same Cause he will make an Estate to me and his Daughter, and to the Heirs of our Two Bodies begotten, of his Mannor of *D.* he shall not make it till we are married, *Godb.* 8.

Defendant covenanted, That if the Plaintiff, *ad instantiam Defendantis*, would marry the Defendant's Daughter, he would pay him 20*l.* and give him Twenty French Pieces towards his Wedding-Dinner; and alledgedeth *in fact'*, that he had married the Defendant's Daughter, and had required him to pay the 20*l.* and he had not paid it; and that Twenty French Crowns amounted to Six Pounds in our English Money, and the Defendant had not paid them. *Object.* 1. He avers not, that he had married her *ad instantiam Defendantis*:

## The Law of Covenants.

*dentis*: But *per Cur'*, it shall be intended so; and Twenty French Pieces is not Twenty French Crowns, for it may be any other Pieces. But *per Cur'*, French Crowns are the common Coin of France, and here known; and it shall be intended according to the usual Speech, Cr. Car. 195. *Poynter and Poyn-*  
*ter.*

In Consideration the Plaintiff would marry his Daughter *Sarah*, he promised to give him as much in Marriage with her, as he gave in Marriage with any of his other Daughters, and alledgedeth he had Three Daughters, *Alice*, *Anne* and *Sarah*; and that *Alice* married *E.* and that he gave *E.* 100*l.* and a Bond of 100*l.* to pay to *E.* 50*l.* more at Three Months end after his Decease, if the said *Alice*, or any Issue of her Body, were then living; and assigns for the Breach, that he had only paid him 40*l.* in his Life-time, and that he had requested of the Defendant his Executors 60*l.* more, and a Bond for the Payment of 50*l.* and avers that *Alice* had such Issue alive. *Per Cur'*, he ought to have averred, that *Sarah*, or some Issue of her Body, was then alive; but the Judges agreed not, whether the Covenant or Promise extends only to Money given, and not to the Bond, Cr. Car. 186. *Cule and Thorn.*

In Consideration of Marriage, the Defendant promiseth or covenants he would pay for the Wedding-Apparel. Plaintiff alledgedeth, he married her, and provided for her Two Gowns and Two Petticoats, and the Defendant had not paid; and it was moved for Error, that he ought to pay for One Gown and One Petticoat, and no more, *Sed non allocatur*. Wedding Apparel to be ta-

ken

ken according to common Parlance, &c. on the Wedding-Day, and used some Time after, and the Declaration is good, *Cr. Car. 53.* and *Fletcher in Scac.*

If *A.* covenants with *B.* Whereas there is a Marriage intended to be solemnized between *A.* and *C.* the Daughter of *B.* at or before the Fourteenth Day of *August* next, and whereas the said *B.* hath paid *A.* 1000*l.* Portion, &c. The said *A.* in Consideration thereof, doth covenant with *B.* That he within One Year of the Day of the Marriage, will assure Lands of the Value of 400*l.* per Annum. Albeit the Marriage be not before that Day, yet the Covenant must be performed, *Trin. 21 Jac. B. R. Gregory and Lane.*

Covenant to pay 300*l.* in Consideration of a Marriage between the Plaintiff and his Daughter; which 300*l.* was to be paid within Three Months after that he shall come to the Age of Eighteen Years, or within Eighteen Days of the Marriage, after Notice made, which shall first happen. *Per Cur,* the Notice shall relate to both, because it is uncertain which of them shall happen first, *Latch. 158. Read and Bullingdon.*

## C H A P.

## C H A P. XV.

*Covenant as to Payment of Rent.*

*In what Cases lies, or not. Vid. Covenant against Executors. Vid. Tit. Assignment.*

C. C. made a Jointure to his Wife *Mary* for her Life, and dies without Issue; T. C. his Brother and Heir, grants an Annuity of Rent-Charge of 200*l.* per *Annum*, to the Plaintiffs in Trust for *Mary*, and this was to be in Discharge of the said Jointure; *Habend* to them and their Heirs, Executors, Administrators and Assigns, in Trust for *Mary*, for Life, with a Clause of Distress and Covenant, to pay the 200*l.* per *Annum* to the Trustees for the Use of *Mary*. The Breach assigned was, That the Defendant had not paid the Rent to them to the Use of *Mary*. Defendant demurs specially, because it appears here as a Grant of a Rent-Charge for Life, which is executed by the Statute of *Uses*, and therefore there ought to have been a Distress for Non-payment. *Per Cur'*, the Clause of Distress is given by the express Words of the Statute to *Cestu que Use*. But here is a double Remedy by Distress or Action; for if the Lessee assign his Interest, and the Rent is accepted of the Assignee, yet Covenant lies against the Lessee for Non-payment, upon the express Covenant to pay. So if a Rent be granted to *S.* and a Covenant is to pay it to *N.* to his Use, it is a good Covenant, 2 *Mod. Rep.* 138. *Coke* and *Herle*.

Double Remedy by Distress or Action.

It was objected, That it is not said the Money was not paid to *Mary*, and if not paid to her, the Breach is not well assigned: But *per Cur'*, it is good. And the Assignment of a Breach, according to the Words of the Covenant, is good enough. And if the Defendant did pay the Money to the Plaintiff, or to *Mary*, he might plead it.

Covenant shall be intended to be brought upon a Deed, according to the Nature of the Covenant. In *Scire fac'* on Recognisance to keep Covenants specified in certain Indentures set forth, which was a Demise by S. to E. and a Redemise by E. to S. rendering Rent at *Lincolns-Inn-Hall*. Defendant pleads Performance. Plaintiff shews, there is Rent due at *Michaelmas* last, and so a Breach. It was moved in Arrest of Judgment, that it is not sufficient. The Condition being to perform Payments in both Indentures, and the Breach is only assigned *In ultimo mentionat'*, and either in Severalty shall not be intended; but *per Cur'*, either of them are supplied by the Nature of the Covenants. The Issue in Chancery was on Payment at *Lincolns-Inn-Hall*, the Venue must be from *Holborn*, 1 *Keb.* 471. *Eden and Spiller.*

If the Lessee assigns his Term, and after the Lessor assigns his Reversion, and the Assignee of the Reversion accepts the Rent of the Assignee of the Term, yet he may have Action of Covenant against the first Lessee. But *per Twysden*, If after such Assignment of the Reversion, Lessor brings Covenant, Lessee may not plead he had assigned over his Reversion. But which of them, whether the Lessor or Assignee, which first brings his Action, shall bar the other, (*viz.*) Lessee

K                    shall

## The Law of Covenants.

shall plead such Recovery in Bar to the former Action, *Sid. 402.* in *Thursby and Platt's Case*, & *i Lev. 259.*

**Rent paid before the Day,** If Lessee covenant to pay his Rent to the Lessor, and he payeth it before the Day, the same is not any Performance of the Covenant ; contrary of a Sum in gross, *i Lev. 136.*

**Express Covenant to pay the Rent at several Days,** Covenant lies before all the Days of Payment past. When express Covenant is to pay the Rent at several Days, Action of Covenant will lie before all the Days of Payment be past, and Action of Debt will not lie till all the Days of Payment be past, and in such Case Debt lies properly on Grant of Annuity for Life or Years, *i Brownl. 19, 20. Mordant and Wats.*

Rent of 200*l.* per *Annum*, granted to *B.* and *H.* for the Life of *M. Hab. &c.* *ad opus & usum M.* and Covenant was in the Indenture to pay the Rent, *ad opus & usum M. B. and H.* brought Covenant, and good. This Remedy by the Statute of *Uses* was not transferred to *M.* *i Mod. 223. Boscarven versus Cook.* By the Statute 27*H. 8. c. 10. Cestuy que Use* of a Rent hath all such Remedies, as if the Rent had been actually granted to him ; but that hath Place only where one is seized of Lands in Trust, that another shall have a Rent out of them, and not where a Rent is granted to one to the Use of another, *Vid. ibid. & 2 Mod. 138.*

A Man grants a Rent to one *pro Life*, and half a Year after to be paid at the Feasts of the Annunciation and *Michaelmas*, by equal Portions, and covenants with the Grantee for the Payment of it accordingly. The Grantee dies *2 Febr.* and for *20l.* which was a Moiety of the Rent, and to be paid at the

Annunciation

Diversity between *Cestuy que Use*, and *Cestuy que Trust.*

Annunciation after, the Executors of the Grantee bring Action of Covenant, it is well maintainable. And by Coke, If a Man grants Rent for another's Life, the Remainder to the Executors of the Grantee, and covenants to pay the Rent during the Term aforesaid; [During this Term,] to what it extends. this is good Collective, and shall serve for both Estates. And it was agreed, when a Rent is granted, and by the same Deed the Grantor covenants to pay it, the Grantee may have Annuity or Writ of Covenant at his Election, *Annuity or Covenant, at Election.* 2 Brownl. 283.

### Declaration.

In Debt for Rent *Quod cum pro Indenturam Quod cum pro Testatum existit;* on Demurrer in Shelbry's Case, Judgment was for the Defendant. But in Covenant on Bond to perform Covenants, such Declaration is good. *Per Cur'*, 2 Keb. in Debt pro 383. Coquer and Crine. 1 Keb. 570. Lenox Rent. and Drury. Debt is grounded on the Demise, which must be more positively alledged. *Contra in Covenant*, which is collateral.

In Debt or Covenant by Heir or Executor, for Rent, he must say the Testator was possessed; and so of Successors of Bishops, he must say he was seised, and convey the Reversion by Deed; for Bishop, Dean, or Corporation, cannot be intended seised in other Capacity, 3 Keb. 69. *Davenant versus Bishop of Salisbury*, 2 Lev. 68.

In Debt on Articles of Agreement to pay Annuity, during the Residue of the Term, assigned to J. S. not shewing for what Years or Term, and Breach assigned in Non-payment during the Residue of the Term, not saying for what Years or Term,

## The Law of Covenants.

without saying [Yet to come]; and so when the Damages are laid, the Term might be expired. After Judgment by *Nihil dicit*, the Court conceived it might be ill. *Contra*, if a Verdict were, for then a Term shall be intended, 1 *Keb.* 435. *Smith and Taylor.*

To pay quarterly, but  
faith not  
*Annuatim.*

Plaintiff declares, That he demised to the Defendant certain Lands for Thirteen Years, to pay to him 40*l.* quarterly, and saith not *Annuatim*: It was amended, and the Word *Annuatim* inserted. By *Keling and Windham*, the Addition of [*Annuatim*], is no more than what the Law implied before, *Ray* 160. *Rymes and Baker.*

In express  
Covenant to  
pay the Rent,  
there needs  
no Demand.

If the Lessee covenant to perform Articles in Indenture, it is sufficient to say, the Rent was demanded; but if there be an express Covenant to pay the Rent, there needs no Demand. 3 *Keb.* 299.

Another Di-  
versity be-  
tween Debt  
for Rent and  
Covenant.

Covenant for Payment of Rent at divers Days, which amount to such a Sum; in the Declaration the total Sum is miscast, yet good, for that all in this Action shall be recovered in Damages. *Aliter in Debt for Rent*, 1 *Rol. Rep.* 351. *Farrer and Snelling*, 3 *Bulst.* 155.

But in Bond  
to perform  
Covenants,  
there must  
be a De-  
mand for the  
Rent.

In Covenant to pay Rent, in the Declaration there is not any Demand alledged, and need not, because the Covenant was to pay such a Sum for Rent expressly. But as to a Condition of a Bond for Performance of Covenants expressed in such a Lease, one of which is for Payment of Rent; in that Case the Bond will not be forfeit without a Demand, 1 *Ventr.* 259. *Norton and Harvey.*

Sir John Spencer made a Lease for Years to Sir John Points, rendering Rent by Indenture. Lessee Covenants, That if the Rent be behind

hind at any Time of Payment, according to the Form of the Indenture, That the Lessor shall have 200*l.* *Nomine Pæne*, for such Default, the Rent is behind. Debt is brought for the *Nomine Pæne*. *Per Cur*, [Nomine Pæne] Action of Debt did not lie without Demand *na.*] of the Rent. *Vide Fitzb. N.B. 120.* seems contrary, *Godb. 154. 1 Rol. Abr. 459, 460.* Sir John Spencer and Point's Case.

### *Who to do the first Act by Demand.*

If a Man lets Land *per Indenture* for Diversity between Covenants and Obligation to perform Covenants. Years, reserving a Rent payable at certain Days at *L.* and the Lessee in the same Indenture covenants to pay the same Rent at the Days and Place aforesaid, he ought to pay it without any Demand of the Lessor, *Pos. 5 Jac. I. E. R. Sir John Spencer's Case, 1 Rol. Abr. 459, 460.*

But if a Man let by Indenture certain Demand of Coal-Mines, reserving Rent, and Lessee is Rent. bound to observe, perform, pay and keep, all Payments, Rents, Covenants, Grants and Agreements in the said Indenture mentioned. In Debt on the Bond it's a good Assignment of the Breach of the Condition, that the Lessee did not pay him the Rent at the Time of Payment, by the Reservation, without alledging he demanded the Rent at the Day of Payment, for he is not bound to demand it; but the other ought to pay it without Demand, *Chapman and Chapman, 1 Rol. Abr. 460.* *Aliter*, if he covenant to pay the Rent, being lawfully demanded.

## The Law of Covenants.

Indenture to  
pay Rent,  
and Bond  
with Condition  
to pay  
the said  
Rent, refer-  
ring to the  
said Inden-  
ture, Lessor  
must demand  
it.

If *A.* lets Land to *B.* per Indenture for Years, reserving Rent, 20*l.* per Annum, payable at Four Feasts by equal Portions; and after *B.* is bound in an Obligation to *A.* upon Condition, that if he pay to *A.* for the Rent of the said Premisses, the yearly Rent of 20*l.* for the Term demised, at Four quarterly Days, according to the Tenor and Effect of one Lease made, bearing Date with this Obligation, and made between the said Parties, according to the Tenor and Effect of the said Lease, by even and equal Portions, then the Bond to be void. The Lessee is not bound to pay the Rent by this Condition, without any Demand of the Lessor, for that this refers to the Indenture of Lease, and that this shall be paid as a Rent, according to the Indenture, *Horn and Barber*, ibid. 460. *Sir Tho. Jones* 33.

Two Tenants in Common make a Lease, and reverse a Rent, and covenant that neither should release, and one of them releaseth his Part; this is a Breach, for that in Debt they should both join, and now by their Release the Action is gone, *i Brownl.* 78. *Brock and Smith*.

## CHAP.

## C H A P. XVI.

*Pleadings to Action of Covenant for Rent, Annuity, yearly Payments.*

UPON a Lease for Years, the Reservation by the Word [Reddend', &c.] and an express Covenant for the Payment of the Rent ; and that the Lessor assigned the Reversion to him and his Heirs, and that the Rent became due at such a Feast after the Assignment, and was not paid, *Et sic infregit Conventionem.* The Defendant pleads, That before the Rent became in arrear, the Lessor had released to him all Covenants and Demands. Plaintiff demurs. *Per Cur'*, Covenant lies upon the Word [Reddend',] but doubted if this Word would maintain Covenant upon a Lease for Life. 2. That the Release of the Lessor, after the Assignment of the Reversion, is no Bar to the Plaintiff, and this by the Common Law, and also by Stat. 32 H. 8. for this Covenant runs with the Reversion. The Case of *Midlemore and Goodale*, Cr. Car. 503. was of a Collateral Covenant, Sir Tho. Jones 102. *Harper and Bird*, 2 Lev. 206.

Release of the  
Lessor after  
the Assign-  
ment of the  
Reversion.

Collateral  
Covenant,

Covenant per Assignees of the Reversion against the Defendant's Lessees, upon a Special Covenant in a Lease for Years, for Payment of the Rent according to the Reservation, and for Non-payment of the Rent incurred ; after the Assignment, the Action is brought. One Defendant *nil dicit*, the other Defendant pleads *Actio non*, and pleads a Release by him before the Assignment to the

## The Law of Covenants.

Plaintiff to the other Defendant by the Consent of the Lessor, and that the Lessor had accepted the other sole Tenant of the Messuage, &c. and he paid one Rent to the Lessor, who had accepted it as of his Tenant. Plaintiff demurs. *Per Cur' on Bret and Cumberland's Case, Cro. Jac. 522.* it is expressly resolved, That no Act of the Lessee can discharge him or his Executors of the Special Covenant, of which also the Assignee of the Reversion shall have Advantage by the *Stat. 32 H. 8. Judgment pro Quer. 2 Bulst. 282.* Sir Tho. Jones 144. *Ashurst's Case.*

No Act of  
the Lessee can  
discharge him  
or his Execu-  
tors of a spe-  
cial Covenant  
to pay Rent.

In Action of Covenant for Payment of Rent reserved in a Lease for Years; Defendant pleads, The Plaintiff after the Lease made, had separated, taken down, and taken away a Penthouse fixed to the said Premisses demised, and detained them before the Rent became due, *Et adhuc detinet.* Plaintiff demurs, and Judgment for him, for this was not a Suspension of the Rent, but a Trespass, for which the Defendant may have his Action, Sir Tho. Jones 148. *Roper and Floyd.*

No Suspen-  
sion of a Rent,  
but a Tres-  
pass.

In Action of Covenant upon Indenture, made between the Wife of the Defendant while she was Sole, to the Wife of the Plaintiff, whereby reciting, that she was seised in Fee of certain Lands, in Consideration of a Marriage to be had between the Plaintiff and her Son, did grant to the Plaintiff a Rent-charge out of these Lands, *Habend' after the Death of her Son,* and covenanted to pay it, &c. The Defendant pleaded, that she had not been long in the Land at the Time of the Grant, but that a Stranger was seised of it. Upon Demurrer it was adjudged *pro Quer.* both because the Defendant is estopped

Defendant  
pleads, *Nihil  
habet in Te-  
nementis.*

estopped by the Deed, and that the Covenant extends to it as an Annuity, *Allen* 79. *New-ton & Uxor versus Weeks & Uxor.*

A Lease for Years of Land by Deed, rendering Rent. Lessee binds himself in a Bond of 10*l.* to perform all Covenants and Agreements contained in the Deed. The Rent is behind, and Lessor brings Action of Debt on the Bond, for Non-Payment. Obligor pleads Performance of all Covenants and Agreements. The Lessor saith, the Rent is behind. It's no Plea for the Obligor to say, the Rent was never demanded: But in this Bar he ought to have pleaded, That he had performed all Covenants and Agreements, except the Payment of the Rent; and as to that, that he was always ready to have paid it, if any had come to demand it. But as to the first Plea, it was held not to be good. But if the Lessee be particularly expressed by Covenant to pay the Rent, there he is bound to do it without any Demand, *Godb. 95.* Vid. *Infra, Chapman's Case.*

Where Demand of the Rent must be pleaded or not.

Covenant to pay Rent, Action is brought for Non-payment. Defendant pleads, levied by Distress pleaded.

Error of a Judgment in Action of Covenant in *Durham*, where Action was brought upon a Lease for 21 Years, and Lessee covenanted to pay 20*l. per Annum per æquas Portiones*, at *Michaelmas and Lady-Day*, and affirms a Breach that he did not pay the Rent, *Debit ad prædictos separales Festos durante termino prædicti*. *Per Curiam*, Judgment by Default: Writ of Enquiry, and then the Breach is well assigned, *Recuperet*, tho' not so particularly, for perhaps it was never paid at any of the Days, *i Lev. 78. Conyers and Smith.* Plead-

Pleading a Release of all Demands to Action of Covenant for Rent, *Henry Hawson's Case*, *Sid. 141.* and *1 Keb. 510.*

Condition to perform Covenants in an Indenture, whereby he let Land, rendering Rent 10*l. per Annum* at such a Feast, or within Six Days after the Feast. Defendant pleads Performance. Plaintiff assigns a Breach, That he such a Day, being the Sixth Day after the Feast, before Sun-set, demanded 5*l.* Rent then due, and that neither the Defendant nor any for him was ready to pay it. *Per Cur'*, he need not shew the certain Time when he came, nor how long he remained there. *Obj.* This Demand was not good, because he demanded as a Rent then due, for he ought to have demanded as a Rent due the last Feast: But *per Cur'*, it is not due to be demanded till the Sixth Day, tho' the Tenant if he will may pay it before, *Cr. Jac. 499. Tompson and Field.*

Debt on Bond to perform Covenants; and one was, That the Defendant pay 12*l. per Annum*, for a Messuage to him demised, quarterly. The Defendant pleads Performance of Covenants. Plaintiff assigns for Breach, that he did not pay 3*l.* one Quarter's Rent. Defendant rejoins before the said 3*l.* was due, The Plaintiff entered upon him and expelled him. Plaintiff demurs, for the Rejoinder is a Departure, and so ruled. *Per tot' Cur'*, there was cited a Difference out of *Cr. Cr. 76.* where the Condition is to perform all Covenants contained, and where it's all Covenants and Payments, there the Defendant pleaded Performance of all. Plaintiff assigned a Breach in Non-payment of Rent. The Defendant cannot rejoin that

Entry and  
Expulsion  
pleaded.

it was not demanded, for it is a Departure ;  
*Raym. 22. Granger and Hemborough.*

In Covenant for Rent, *Nil debet* may be *Nil debet.*  
 pleaded, the Covenant doth not alter the  
 Rent, *Vide Infra.* But *Grainger and Hembor-*  
*rough's Case* is more particularly reported in  
*Rolls.*

Debt on Bond for Performance of Coven-  
 ants ; Defendant pleads Performance gene-  
 rally. Special Breach is for Non-payment  
 of Rent. Defendant rejoined, that the Plain-  
 tiff entered before the Rent-Day. *Per Cur'*,  
 it is a Departure (but in *Baker and Spaines,*  
*Hob. 7.* it was alledged in the Rejoinder,  
 there was no Demand made); but all agreed, *Entry before*  
 that in Action of Covenant this Rejoinder *the Rent-*  
*Pleading.* *Departure in*  
 had not been good. But by *Windbam* it's a  
 Departure, and not like the Case of De-  
 mand, which is necessary to make the Rent  
 due, whereas this is only an Excuse of what  
 he confesseth, *1 Cr. 76. Chapman's Case.* By  
*Twisden* it should have been pleaded, That  
 the Defendant had performed Covenants spe-  
 cially, paying his Rent till such a Day, and  
 that the Lessor entered, and so agreed. *Per*  
*Cur'*, but this general Performance is intend-  
 ed of an actual Performance. And by *Twis- den*, upon general Performance pleaded, the  
 Plaintiff replies, Rent-Arrear ; the Defen-  
 dant cannot rejoin by Want of a Demand,  
 tho' he might have excused himself by plea-  
 ding a Tender in Bar, *1 Keb. 115, 178, 185,*  
*283. Grainger and Hemborough.*

Covenant, Breach in Non-payment of Rent  
 according to the Covenant in the Indenture.

Defendant pleads *Nil debet*; *Nil debet* is no  
 Plea in this Case upon the Indenture, adjudg- *Nil debet no*  
 ed upon general Demurrer, *3 Lev. 170. Tin-*  
*dall and Hutchinson.* *Plea.*

Cove-

## The Law of Covenants.

In Debt or  
Covenant up-  
on a Deed  
not indented.  
Plea *Nil ha-  
buit.*

Repl. *Habuit,*  
without na-  
ming what  
Estate, ill.

Condition  
Subsequent  
and not Pre-  
cedent.

Covenant upon a Deed not indented, and declares upon a Lease of certain Land to the Defendant, rendring Rent, and covenants to pay it, and assigns Breach in Non-payment. Defendant *protestando*, that he did not enter nor occupy the Land, as the Plaintiff had supposed. *Pro Placito dicit*, That the Plaintiff, *Nil habuit in Tenementis tempore dimissionis*. Plaintiff replies, *Quod habuit bonum totulum unde potuit dimittere*. Defendant demurs generally, and the Court held the Replication ill, not shewing what Title he had, according to *Crok. 2. 312.* And this notwithstanding it was not by Indenture, and it is all one in Debt for Rent ; for if there is not any Rent, there is not any Covenant to pay the Rent ; *3 Lev. 193. Aylet and Williams.*

Covenant to pay to the Defendant's Wife (on Separation) *50 l. per Annum*, and for Non-payment the Separation continuing, the Action is brought ; but upon *Oyer* it was, *Proviso* that the Wife would live at such a Place as *N.* and *W.* appointed. Defendant pleads, She did not live at such a Place as *N.* and *W.* appointed. The Plaintiff replies, That she was always ready to live at any such Place, but that *N.* and *W.* appointed no Place. Defendant demurs, as being a Condition Precedent. But *per Cur'*, this is not a Condition Precedent, but a Condition Subsequent, and in Defeasance. The Covenant being in pursuance of a former absolute Agreement to pay so much, and it is like the Assent of the Husband, which is intended till the Contrary appear, and here must be an Appointment : And Judgment *pro Quer.* *3 Keb. 229, 363. Leech and Beere.*

In

In Action of Covenant, the Defendant cannot plead the Plaintiff *Nibil habuit in Tenementis*, though such Plea is good in Action of Debt for Rent, 2 *Ventr.* 99.

If Rent be reserved out of a Thing Incorporeal, and there is an express Covenant to pay it : Qu. If he may plead Eviction ? *Allen* 79. One reciting that he was seised of Land, granted a Rent out of it, and covenanted to pay the Rent ; he could not plead to his Covenant that he had nothing in the Land, 2 *Ventr.* 69.

Covenant for not paying of Rent. Defendant pleads Entry and Suspension. Plaintiff replies, The Defendant did re-enter, and so was possess'd of his former Estate, it's an ill Replication, for they ought to shew that he entered and was possess'd till the Rent grew due.

*Note*, To make Suspension of a Rent reserved on a Lease for Years, the Lessor must oust the Lessee of Part of the Thing let at least, and hold him out till after the Day on which the Rent is payable ; and if the Lessee re-enter, the Rent is revived, *Stiles p. 432.*  
*Page and Parr.*

Covenant, on a special Covenant, to pay Rent at certain Days. The Defendant pleads, That no Rent was behind. It is an ill Plea in Covenant, for by that Plea the Defendant confesseth the Covenant broken, and that Plea tends but in Mitigation of Damages, 1 *Brownl.* 19. *Hare and Surle.*

But in *Brownlow's 2d Part*, this Case is reported, 273, that the Defendant levied by Distress. By this Plea the Defendant confesseth, that it was not paid according to the Reservation, for the Plaintiff cannot distrain if

Entry and Suspension.

What will make a Suspension of Rent.

That no Rent is behind, an ill Plea in Covenant.

Levied by Distress.

**Payment at the Day.**

if it were not behind after the Day ; but Payment at the Day had been a good Plea.

**Expulsion.**

**Covenant that the Lessee shall pay for the Farm and Occupation so much.**

*A.* leased to *B.* Land for 40*l.* per Annum, and a Stranger covenanted with *A.* that *B.* should pay him 40*l.* for the Farm and Occupation of the said Lands. *A.* brought Covenant, Defendant pleads, that before the Day of Payment the Plaintiff put the said *B.* out of his Farm. *Per Cur'*, it's a good Plea, for the Defendant hath covenanted that the Lessee shall pay for the said Farm and Occupation 40*l.* so it is as a Conditional Covenant, and here is *Quid pro quo*. And here the Consideration upon which the Covenant is conceived, (*viz.*) the Farm and the Occupation of it, is taken away by the *A&E* of the Plaintiff himself, 3 *Leon.* p. 159. 2 *Leon.* 115. *Beadle's Case.*

**Entry and Expulsion.**

**That the Defendant did not pay the Rent according to the Form and Effect of the Condition of a Bond to perform Covenants.**

Debt on Bond for Performance of Covenants, Articles, &c. contained in a Lease for a Year. Defendant pleads Performance of Covenants. The Plaintiff replied, That the Defendant did not pay the Rent reserved upon the Lease at such a Day, according to the Form and Effect of the Condition of the Obligation. Defendant rejoins, and alledgeth an Entry by the Plaintiff into the Land leased before the Rent, and that he kept Possession till the Rent-day was pass'd. On Issue

found *pro Quer'*, the Defendant moved in Arrest of Judgment, for that the Plaintiff saith the Defendant paid not his Rent according to the Form, &c. of the Condition of the Obligation, whereas there is no Mention of any Payment of the Rent in the Condition of the Bond, but in the Lease only; *Sed non allocatur*; because the Defendant by this Rejoinder has confess'd that such a Rent

was Arrear, and has waved taking Issue upon it, and taken Issue upon another Matter, and therefore this shall be well enough after a Verdict. And *per Hale C. B.* it is all one in Substance to plead as the Plaintiff has done, and to have pleaded *Secundum formam & effectum Indenture*, for the Condition of the Bond comprehends all that is comprehended in the Lease, *Hardr. 319.* It might have been a Question, had it been upon Demurrer.

Bond on Condition to perform Covenants in a Lease. One was, That he should pay 40*s.* yearly at the Feast of the Annunciation, or within Fourteen Days after ; and the Breach assigned was for Non-payment at such a Feast in such a Year. Defendant paid it at the Feast on which they were at Issue, and on Evidence it appeared that the same was not paid at the Feast, but in Eight Days after it was paid. *Per Cur'*, by his pleading that he paid it at such a Day certain, and tendering that for a Special Issue, he hath made it part of the Issue ; but if he had pleaded that he had paid it within Fourteen Days, (*viz.*) the Eighth Day, that had not made the Day Parcel of the Issue ; but then he might have given Evidence that he paid it at another Day within the Fourteen Days. Qu. If the Breach be well assigned, in saying he had not paid it at the Feast, without saying, nor within the Fourteen Days ? Godb. 100. Plymton's Case, & 10*fo.*

Defendant  
pleads he paid  
it at the Feast.

Where the  
Day is made  
Part of the Is-  
sue.

Error in the *Exchequer-Chamber* of a Judgment in Debt in *B. R.* on Bond of 200*l.* conditioned, That if the Obligor should at all Times well and truly pay, perform and keep, all and singular the Rents, Covenants, Grants, Articles, Payments and Agreements, which

on

## The Law of Covenants.

On Bond to perform Covenants where Demand of Rent need not be alledged.

on his Part, &c. Defendant pleads generally Performance of all Covenants. Plaintiff replies, and shews a Breach for Non-payment of the Rent at such a Time, but doth not shew any Demand of that Rent; whereupon the Defendant demurred, and it was adjudged *pro Quer.* Now the Defendant assigned for Error, that for as much as the Condition of the Bond is general, and not particularised for the Payment of the Rent, the Rent is not payable without Demand, and therefore the Breach was not well assigned. *Cur' contra*, and that the Judgment is well given, for he pleading Performance of the Payments, Covenants and Agreements, it shall be intended he had really performed them, and so had paid all the Rents; and when the Plaintiff replies, that he had not paid such a Rent, he need not to alledge a Demand, for the Defendant may not say it was demanded, for then it should be a Departure from his Plea; and yet the Obligation being general for Performance of Covenants, doth not alter the Nature of the Rent, but that it ought to be demanded, *Cr. Car. 76. Chapman's Case, Hutton 90.*

In Covenant, Plaintiff declares, That she was possess'd of certain Houses in St. Martin's Lane for a Term of Years, and that she demised the said Houses to R. G. for Twenty one Years, under a certain Rent, which he covenanted to pay; that before the sealing of the Lease, it was indorsed for the Payment of 12 Bottles of Canary Wine every Year to *Christian Towy* the Lessor. Lessee entered and made his Will, and made *Susan Gill* sole Executrix, she entered, and assigned the Term to the Defendant, who entered, &c. and assigned the Breach in Non-payment of the

Twenty four Bottles of Sack, which was due for Two Years, and also for Arrears of Rent after the Assignment made to him by the said Executrix. Defendant pleads, That before the said Wine and Rent became due, he assigned his Interest to *James Mott*, but did not plead Notice given to the Plaintiff, or that she had accepted the Rent. Judgment on Demurrer in *B. C.* was given *pro Quer'*, and Writ of Error brought. Now in *Keighly and Bulkly's Case*, 1 *Sid.* 338. Debt was brought for Rent by Assignee of a Reversion against the Assignee of a Term, who pleaded, that he had assigned over his Interest, but not that he had given Notice of the Assignment; he was adjudged still Tenant, because he had not given such Notice; but by *Twisden* he need not give Notice. Error was brought in that Case, and *C. J. Hales* and *Bridgman* were of Opinion, that Notice was not necessary; but in the principal Case, Judgment was given for the Defendant in the original Action, and the Judgment in the *Common-Pleas* reversed. It was held, that the Assignee was chargeable by Reason of the Land, and when he had parted with his Interest, there could be no Reason given why he should be any longer liable, especially since the Executor of the Lessee is still bound to perform the Covenants in the Lease so long as she hath Assets; and that was the true Reason of *Helial and Casbard's Case*, 1 *Sid.* 266. Vid. 2 *Ventr.* 228. 3 *Lev.* 295. 4 *Mod.* 71. *Pitcher and Tovey*, 1 *Sid.* 338. *Kibbly and Bulkly*, 1 *Lev.* 215.

In Action of Covenant, declaring of a Lease by Deed for Twenty one Years, upon a Special Covenant to pay the Rent. The

L Defendant

## The Law of Covenants.

Defendant pleads a former Lease made by Bargain and Sale to one *Allen*, by the Lessor for 1000 Years; but no Entry is alledged of the first Lessee; to which the Plaintiff demurred on *4 Rep. 53. Dier 256.* because no express Eviction is made of the Estate, but only of the Possession, and especially because

**A good Lease by Way of Estoppel.**

**Eviction by Attainder, the King is in Possession.**

**But not a common Person before Entry.**

**Attornment.**

**Assignment.**

**Assignment and Acceptance pleaded.**

Twisden agreed this a good Lease by Way of *Estoppel*, and if the Rent be in being, the Covenant remains; *& cœverso*, if not; which the Court agreed: But it being said that *Allen* was attainted by Reason whereof, and of the Statute 13 Car. 2. it came to the Crown. This is a sufficient Eviction, without any Entry or Office alledged, and the King is in actual Possession as much as if the Party had actually entered, altho' a common Person should not be in actual Possession without Entry by himself or the first Lessee; and Judgment *pro Defendant*: For this cannot be good as a Lease in Reversion, being not so pleaded, but as a Grant of a present Estate; and being a Lease extracted

out of the Inheritance, there needs no Attornment be alledged, being by Bargain and Sale.

But all agreed, that upon Assignment of Lease there must be Attornment, and in both, special Notice must be given by the Assignee as to Penalties, tho' not as to the Rent. The Plaintiff hath declared of a Lease in Possession, as at Common Law, is avoided by Eviction, *2 Keb. 444. Banckes and Smith, vid. 1 Sid. 349.*

In Action of Covenant express to pay Rent, against the Lessee he pleads Assignment and Acceptance; to which the Plaintiff demurred, because he hath Election, notwithstanding his Acceptance of Rent of the Assignee, which

which the Court agreed on, 1 Cr. 503. Middlemore and Goodale's Case, albeit this doth continue as a Rent. Judgment pro Quer', 2 Keb. 640. Chapman and Cantrell.

*Mascall* let a House for Years to *A.* by Inclosure, by which *A.* covenanted with *M.* to repair the House, and that *M.* should enter to see in what Plight the Reparations stood, and if Default was found, and thereof Warning be given to *A.* his Executors, &c. then within Four Months after such Warning the Default should be amended. The House in the Default of the Lessee became ruinous, *M.* granted the Reversion over in Fee to *C.* who upon View of the House gave Warning to *A.* of the Default, which is not repaired; upon which *C.* as Assignee of *M.* brought Covenant. It was moved, the Action did not lie, because the House became ruinous before his Interest in the Reversion. *Sed per Cur'*, the Action is not conceived upon the ruinous Estate of the House, but for not repairing it within the Time appointed by the Covenant after the Warning, 1 Leon. p. 62. *Mascall's Case.*

Covenant by  
Assignee of  
the Reversion  
about Repairs  
of Ruin be-  
fore his In-  
terest granted.

## C H A P. XVII.

## Covenant for Payment of Rent, where to be tried.

Affinee of  
the Reversion  
shall have Co-  
venant  
against the  
Lessee where  
the Lease was  
made.

**A** Signee of the Reversion shall have Covenant against the Lessee where the Lease was made, for Covenant goes only in Privity of Contract; and altho' now by the Statute the Covenant passeth to the Affinee, yet the Nature of it is not altered by the Statute; but it is assignable only as a Contract, and therefore ought to be brought where the Contract was made, otherwise in Debt for Rent, *Vid.* 1 Lev. 259. *Thurby and Plant,* 1 Sand. 237. 1 Sid. 401.

Covenant was brought for Non-payment of Rent, upon a Demise of Allum-Mines. Defendant pleads, the Plaintiff inclosed the Mines, so that the Defendant could not have Ingress to the Work, and this tried at London, where the Covenant was alledged to be made, moved that this was a Mistrial; but this is aided by the new Stat. 16 & 17 Car. 2. c. 8. *An Act to prevent Arrests of Judgment.* Sir Tho' Jones 82. *Aynsworth and Chamberlain.* Yet in the Case of *Crofts and Winter, Hill.* 20 & 21 Car. 2. B. Regis held the contrary, see the Case of *Gerrard and Holland,* 2 Cro. 43. But by the latter Opinion this is aided by the *Vid* Statute.

Stat. 16 &  
17 Car. 2.  
c. 8.

Damages.



## Damages.

A Man made a Lease for Years ; Lessee covenants to make Reparation, Lessor grants the Reversion to another, and Lessee for Years made his Wife Executrix and died. *Per Cur'*, the Grantee of the Reversion shall not recover Damages but from the Time of the Grant, and not for any Time before, and yet the Executrix (the Wife) shall be charged for not Reparation, as well in the Time of her Husband, as in her own Time ; and if she do make Reparation depending the Suit, yet thereby the Suit shall not abate, but it shall be a good Cause to qualify the Damages, 3 Leon. 51. by *Manwood*. In this Case, by the Recovery of the Damages the Lessee shall be excused ever after for making Reparations, for the Covenant is extinct.

A Copyholder in Fee made a Lease of a Meffuage for Twenty one Years, warranted by the Custom, &c. Lessee covenanted to repair during the Term. Lessor grants the Reversion to his Son, who surrendered to the Plaintiff, who brought Action of Covenant against the Lessee for not repairing. Qu. was, Whether it will lie, because it's a Copyhold ? And so not within the Statute 32 H. 8. c. 34. *Per Cur'*, a Copyholder hath an Inheritance, and his Estate is establish'd by Custom, and it's Reason to construe him within the Equity of this Statute, 4 Mod. 80. 3 Lev. 326. *Glover and Cope*.

If one covenant to keep and leave an House in the same on as good Plight as it was at the Time of the making the Lease ; in this Case the ordinary and natural Decay

## The Law of Covenants.

of it is no Breach of the Covenant, but the Covenantor is hereby bound to do his best to keep it in the same Plight, and therefore to keep it covered, &c. *Fitzb. Covenant 4.*

If one covenant to leave a Wood in the same Plight he finds it, and he cuts down Trees, the Covenant is broken presently, for now it is become impossible by his own Act to be performed. *Aliter*, in case some of the Trees be blown down, for now it is become impossible to be done by the Act of God, and the Covenantor is not bound to supply it.

In a Covenant to sustain Houses, Sea-banks, or covenant to leave them in as good Case as one doth find them, and the Houses be burnt or thrown down by Tempest, or the Banks overthrown by a sudden Flood, in this Case the Covenant is not broken by these Accidents only ; but if the Covenantor do not repair and make up these Things in convenient Time, the Covenant will be broken, *Fitz. Covenant 29. 5 Rep. 15. 1 Rep. 98. Perk. Sect. 738. Plo. 229.*

If Houses are let to me for Years, and I covenant to leave them in as good Plight as I find them, and I throw down the Houses; this is no Breach of the Covenant, for I may re-edifie them, and so no Action will lie upon this Covenant till the End of the Term.

Covenant

Covenant for Reparations.

*Magd. Coll. Oxon* seized of an House and a Mill, demised it to *Lewin* for 31 Years; *Lewin* let the Mill to *J. S.* for 5 Years, and afterwards demised the House and Mill to *Forth*, by Indenture for 31 Years; *Forth* covenanted to repair the Premisses, *durante Termino praedicto*, of 21 Years, *J. S.* refused to Attorn; and whether *Forth* were bound to repair the Mill was the Question, because it was alledged, That the Covenant was to repair during the Term, and nothing in the Mill passed during the 5 Years, for want of Attornment. *Per Cur*, he is bound to repair, though the Lease did not commence in Point of Interest, yet it did in Point of Computation; and this Covenant was to repair during the Term of 31 Years. *1 Vent. 185.*

*Lewin* and *Forth*. *2 Keb. 879.*

Defendant covenants, That *ab & post emendationem & reparacionem dicti Messuagii*, by the Plaintiff, he at his proper Costs and Charges, as Need shall require, should well and sufficiently repair and sustain the said Houses: The Defendant is not to repair it till the Plaintiff hath first repaired it; and though it were in good Reparations at the beginning, if it afterwards happen to decay, the Plaintiff is first to repair it, before the Defendant is bound thereunto, for this is not within the Reach of the Covenant, if the Lessor do not first repair them. *Cro. Jac. 645. Slater versus Stone, 2 Rol. Rep. 248. Mesme Case. Vide infra, Bray and Nightingale's Case contra*, for there is a Covenant by the Lessor to Repairs, and so mutual Covenants.

Lease com-  
mencing in  
Point of In-  
terest, or in  
Point of Com-  
putation.

Defendant  
covenants af-  
ter Repairs by  
the Plaintiff  
he will sustain  
it, Defendant  
is not bound  
to repair it  
till the Plain-  
tiff hath re-  
paired it.

## The Law of Covenants.

Lessor covenants to repair during the Term, if Lessor will not do it : Lessee may do it, and pay himself by Way of Retainer. *1 Leon. 237. Beale and Taylor.*

*Dimissa præd  
Reparare.*

Covenant is to erect Three Messuages, and *dimissa præd reparare*, and the Covenantor erects 5 Messuages, he is bound to keep all in repair. *3 Levin. 264, 265. 2 Vent. 126. Douse contra Earle.*

King's Paten-  
tee bound to  
repair.

In the King's Letters-Patents there is a Clause for the Patentee's repairing ; though this is by Patent, wherein the Lessee takes only, yet that Clause shall be taken and interpreted as a Covenant on the Lessee's Part to bind him, and his Assigns ; for when he takes by the Patent, he consents to all Things therein ; and the Words in that Clause, [for the leaving and keeping the Houses and Fences in Repairs,] are as spoken by him, and it is a Covenant which runs with the Land ; and though the Bargainee be not named Assignee in the Declaration, it's good enough. *Cro. Jac. 240. Lord Ewer and Strickland.*

One lets a Lease of Houses, Courts, Orchards and Gardens, appertaining to them ; Defendant covenants to repair the Houses, Edifices and Buildings, with necessary Reparations, and that he would maintain and keep *dimissa Præmissa*, with Pailing and Fencing, and at the End of the Term would leave *Domos & alia Præmissa*, sufficiently maintain'd, repaired, paled and fenced ; and shews, that at the Time of the Lease the Houses were well repaired, and that afterwards, *diversa Domus loca parcella, & res eorundem Tene-mentorum decasual' dirupta & fracta fuer' & in decasu devener' & diversæ aliae percellæ & res eo-* runderem

rundem Tenementorum & Præmissorum eisdem Præmissis affixa ab inde avulsa & asportat' fuer' prout sequitur; and instanceth in the Pavement of the Court, carrying away the Locks and Keys of a Cupboard, the breaking of the Glass in the Windows, carrying away of a Shelf, which was not shewed to be fixed; it was objected, That the Breach for not repairing the Pavement is out of the Covenant, for it is neither Building, Pailing, nor Fencing. *Sed per Cur'*, It is within the Intention of the Covenant, and it is *quasi*, the Building, and within the Words, [leave them sufficiently repaired] and the Shelf need not be shewed that it is fix'd. *Cro. Jac. 329. 2 Bulstrode 112. Pyot and Lady St. John.*

Pavement,  
*quasi* the Building.

There is a Case in 3 Leon. 51. A Man made a Lease for Years, and the Lessee covenanted to make Reparations. Lessor granted the Reversion to another, Lessee for Years made his Wife his Executrix, and died.

*Per Cur'*, the Grantee of the Reversion shall not recover Damages, but from the Time of the Grant, and not for any Time before; but yet the Wife, the Executrix, should be charged for the not Reparation, as well in

Grantee of  
the Reversion  
not to recover  
Damages,  
but from the  
Time of his  
Grant.

Time; and if she do make the Reparation depending the Suit, yet thereby the Suit shall not abate, but it shall be a good Cause to qualify the Damages, according to that which may be supposed that the Party is damned for the not Repairing, from the Time of the Purchase, to the Time of the bringing the Action; and by *Mamwood*, by the Recovery of the Damages, the Lessee shall be excused ever after for making of Reparations; so as if he suffer the Houses for

want

want of Reparations to decay, that no Action shall be brought for the same thereupon afterwards, but the Covenant is extinct.

It is agreed the Lessee shall keep the House in good Repairs, the Lessor putting them in good Repair, Covenant lies against the Lessor upon these Words. *1 Sid. 423. Prettyman and Thou, cited 1 Rol. Abr. 518.*

## C H A P. XVIII.

*Covenant for Reparation. Declaration.*

**T**HE Defendant, by Indenture upon a Lease made unto him of an House, covenanted, That he would from Time to Time, during the Term, after 3 Months Warning, sufficiently repair, and at the End of the Term leave it sufficiently repaired to the Lessor, &c. and for not leaving it sufficiently repaired at the End of the Term, Action was brought; and shews, in what Part, &c. Defendant demurred, because he doth after not alledge, That he for 3 Months before gave Notice unto him of the Defects. But *per Cur'*, the Declaration is good, notwithstanding that Exception; for the Clause, [To leave it well repaired at the End of the Term,] is distinct by it self, and doth not depend upon the former Clauses; for he ought to leave it sufficiently repaired without Notice, at his Peril; and the Notice within 3 Months refers only to the Reparations within the Term, whereto he is not tied without

Three

Three Months Notice before. Cro. Jac. 644.

*Harfleet and Butcher.*

In Covenant for not repairing an House, being *in Decay*, and not said wherein; to which the Plaintiff demurred, and shewed for Cause, that it was not particularly set forth wherein it was in Decay; which *per Cur'*, is ill as well as in Waste. 3 Keb. 478. Countess of Portland *versus* Andrews.

Shews not wherein the House was in Decay.

The Plaintiff let Houses for Years to the Defendant, and covenanted to repair the Houses by such a Day; the Defendant by the same Indenture covenanted with the Plaintiff, That from the Time that the Plaintiff was to repair the Houses, unto the End of the Term, he would repair and leave them so repaired; and for not performing this Covenant on the Defendant's Part, the Plaintiff brought his Action. Defendant demurred to the Declaration, because the Plaintiff had not shewed for his Part that he had repaired the Houses according to the Covenant, and so the Declaration supposed he was not bound to repair, because he was bound to repair from the Time that the Plaintiff had repaired them, and not before, and so no Cause of Action, by Rolls in Brag and Nightingall's Case. Stiles 140. These are Reciprocal Covenants, if one doth not perform the Covenants on his Part, it doth not excuse the other. Vide this Case in 1 Rol. Abr. 416.

Plaintiff co-  
venants to re-  
pair by a Day,  
and the Co-  
venants to re-  
pair after the  
Day are mu-  
tual Cove-  
nants.

The Covenant of *A.* to repair it before *Midsummer*, is not a Condition Precedent, but only the Time divided and mutual between *A.* and *B.* (*viz.*) That *A.* shall repair it before *Midsummer*, and *B.* after during the Term, for which each of them may have his Remedy by Action against the other.

The

## The Law of Covenants.

want of Reparations to decay, that no Action shall be brought for the same thereupon afterwards, but the Covenant is extinct.

It is agreed the Lessee shall keep the House in good Repairs, the Lessor putting them in good Repair, Covenant lies against the Lessor upon these Words. *1 Sid. 423. Prettyman and Thou, cited 1 Rol. Abr. 518.*

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THE Defendant, by Indenture upon a Lease made unto him of an House, covenanted, That he would from Time to Time, during the Term, after 3 Months Warning, sufficiently repair, and at the End of the Term leave it sufficiently repaired to the Lessor, &c. and for not leaving it sufficiently repaired at the End of the Term, Action was brought; and shews, in what Part, &c. Defendant demurred, because he doth after not alledge, That he for 3 Months before gave Notice unto him of the Defects. But *per Cur'*, the Declaration is good, notwithstanding that Exception; for the Clause, [To leave it well repaired at the End of the Term,] is distinct by it self, and doth not depend upon the former Clauses; for he ought to leave it sufficiently repaired without Notice, at his Peril; and the Notice within 3 Months refers only to the Reparations within the Term, whereto he is not tied without

Three

Three Months Notice before. Cro. Jac. 644.

*Harfleet and Butcher.*

In Covenant for not repairing an House, being *in Decay*, and not said wherein; to which the Plaintiff demurred, and shewed for Cause, that it was not particularly set forth wherein it was in Decay; which *per Cur'*, is ill as well as in Waste. 3 Keb. 478. Countess of Portland *versus* Andrews.

Shews not wherein the House was in Decay.

The Plaintiff let Houses for Years to the Defendant, and covenanted to repair the Houses by such a Day; the Defendant by the same Indenture covenanted with the Plaintiff, That from the Time that the Plaintiff was to repair the Houses, unto the End of the Term, he would repair and leave them so repaired; and for not performing this Covenant on the Defendant's Part, the Plaintiff brought his Action. Defendant demurred to the Declaration, because the Plaintiff had not shewed for his Part that he had repaired the Houses according to the Covenant, and so the Declaration supposed he was not bound to repair, because he was bound to repair from the Time that the Plaintiff had repaired them, and not before, and so no Cause of Action, by *Rolls in Brag and Nightingall's Case. Stiles 140.* These are Reciprocal Covenants, if one doth not perform the Covenants on his Part, it doth not excuse the other. *Vide this Case in 1 Rol. Abr. 416.*

Plaintiff co-  
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pair after the  
Day are mu-  
tual Cove-  
nants.

The Covenant of *A.* to repair it before *Midsummer*, is not a Condition Precedent, but only the Time divided and mutual between *A.* and *B.* (*viz.*) That *A.* shall repair it before *Midsummer*, and *B.* after during the Term, for which each of them may have his Remedy by Action against the other.

The

The Assignee of a Reversion may maintain Covenant for Repairs, though not named in the Covenant in the Lease. 1 *Lev.* 109. and likewise may maintain Covenant in the County where it's supposed to be made; *aliter in Debt, ibid.*

**Shews not  
that the Racks  
were fixed to  
the Stable.**

Covenant, That the Defendant shall put in good Repair, the Houses, Out-Houses and Stables; the Breach was, That the Defendant permitted the Racks in the Stable to be in Decay. It was moved in Arrest of Judgment, that the Plaintiff did not set forth that the Racks were fix'd in the Stable, and so Part of the Freehold. By *Pollexfen*, it ought to have been shewed, that the Racks were set up and fixed, *alii Justiciarii contra.* It shall be intended they shall be fixed for the Use of the Stable. 2 *Ventr.* 214.

**Necessary  
Timber to be  
allowed by  
Lessor.**

Covenant, That the Lessee should repair the House, provided, and it was agreed, that the Lessee should have necessary Timber to be allowed and delivered by the Lessor; the Lessor allowed so many Loads of Timber, and a general Request was laid: The Plaintiff should have alledged a Special Request to the Defendant, it was laid in the Declaration that a Stranger brought the Timber, which was all, for that amounted to an Entry on the Lessee's Possession, 1 *Brownl.* 23. *Holden and Taylor.*

**Covenant to  
find Meat,  
Drink, Appar-  
el, and o-  
ther Neces-  
saries, and  
shews not  
what those  
Necessaries  
were.**

Error of a Judgment in *Northampton*, in a Writ of Covenant; the Error assigned was, That the Declaration there was ill, because he declares of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel and other Necessaries, and doth not shew in particular what other Things were Necessaries, and the Breach was

was assigned as general as the Covenant, (*viz.*) That he did not find him with Meat, Drink, Apparel and other Necessaries, and doth not shew in particular what other Things were necessary or not: And *per Cur'*, the Declaration was ill. *Cro. Jac.* 486. *Mills and Astell.*

Lessee covenants, That he would not cut down more Timber growing than sufficient for needful Reparations of the Building: The Plaintiff assigns a Breach, That he had cut down Timber to the Value of 10*l.* and converted it to his own Use. Verdict *pro Quer.* *Per Cur'*, it's Erroneous, it is not the same Covenant, and so no Breach if he had converted it to his own Use, except it be averred that he had cut down more than was necessary for Reparations. *Stiles p. 5.* *Wingfield and Sherwood.*

Defendant covenanted, That he, his Executors and Assigns, would repair a Mill, and alledgedeth, That the Mill was defective in Reparations; and the Defendant, his Executors and Assigns, did not repair it. The Declaration was demurred to, because he did not alledge that he, nor his Executors or Assigns, did not repair it. *Per Cur'*, it ought to be alledged in the *Disjunctive*, not in the *Conjunctive*. *Cro. Eliz.* 348. *Colt and How.*

#### *Covenants for Reparation, Building, Pleadings.*

In Covenant to repair, and so to leave the Premisses repaired; in the Declaration the Plaintiff shews the Breach in Sixty Rood, &c. Defendant pleads, That one Barn was pulled down by the Plaintiff's Consent; and as to the

## The Law of Covenants.

**Particular  
Breach not  
answered.**

**Plea, That  
it was suffi-  
ciently re-  
paired before  
the Action  
brought.**

**Concord exe-  
cuted, plead-  
ed, tho' not  
in Writing.**

\***Breach, That  
the House was  
burnt down  
by Negli-  
gence.**

the rest that they were repaired and so left. To which the Plaintiff demurred generally, the particular Breach being not answered. *Per Hale,* he should have either taken Issue *reparravit,* the Particulars, or to say they were not *in decasu modo & forma,* 2 Keb. 298. *Mawood and Ingham.*

Plaintiff declares, That he let to the Defendant an House, and that he covenanted to repair it. Defendant pleads it was sufficiently repaired before the Action brought. Plaintiff demurs, because he doth not plead that he himself did it. *Keling and Rainsford* inclined against the Demurrer, for be it repaired tho' by any Body, the Plaintiff hath no Damages nor Cause of Action. *Twisden* doubted ; afterwards they waved the Demurrer, 1 Ventr. 38. 2 Keb. 535.

Defendant pleads, That after the Decay he made such a Concord, that the Plaintiff should take 30 s. and such Goods in Satisfaction of that Destruction, &c. and shews it to be executed : On Demurrer it was held the Plea was good. Tho' when an Action is grounded upon a Deed, it cannot be discharged unless by Deed ; as a Bond with Condition cannot be discharged by Contract. But this Plea here is not pleaded in Discharge of the Covenant, but only for the Damages which are demanded by Reason of the Breach of the Covenant, and the Covenant remains. And in every Action where only Amends is demanded by Way of Damages, Accord executed is a good Bar in discharge of them, and so adjudged ; Cr. *Jac.* 199. *Alden and Blagge.*

In Covenant for not Reparations, the Plaintiff shews for \* Breach, that the House was

was burnt down thro' the Negligence of the Defendant, &c. and that he did not repair it. Defendant traverseth, that it was not burnt down, *prout*, &c. And it was adjudged an ill Traverse, because the Defendant's not repairing it is the Substantial Part, and the other but Inducent, 24 Car. 1. *Allen* and *Reeves's Case*, cited *Harder*. 70. But in *Stiles*, the Case is thus :

Plaintiff declares, and shews, that one of the Houses was burnt down by Negligence. Defendant pleads a special Plea ; That the House which was burnt, was not burnt by Negligence, nor with common Fire, as the Plaintiff hath declared ; and as to the rest pleads the general Issue, that they were in good Repairs at the End of the Term. This Plea contains a Negative Pregnant, for there are Two Matters offered in Issue : 1. That the House was not burnt down by common Fire. 2. That it was not burned by the Negligence of the Party. It ought to have been demurred to, but there was a Verdict, *Stiles* 88.

Lessee covenants to repair an House to him demised, during the Term, within Three Months after Notice given, and to leave it so repaired. It is in the Election of the Lessor, either to give Notice, or if Lessee do not repair, during the Term, to bring Covenant ; and that they were several Covenants. And that if the Lessee comes without Leave, after the Term ended, to repair the House, he is a Trespasser. The first Covenant was absolute, and the second Conditional, and one shall not take away the Effect of the other, 2 *Rol. Rep.* 250.

Negative  
Pregnant.

Covenant to  
repair after  
Notice, and  
to leave it so  
repaired.

Several Coven-  
ants.

The Breach assigned *in hoc*; Whereas the Defendant being Lessee for Years, covenanted at the End of the Term to leave and yield up the Tenements well repaired to the Plaintiff, and that he had not left, &c. Defendant pleaded, That one *Blunt* was seised in Fee until by the Plaintiff disseised, who let to the Defendant; and afterwards *Blunt* re-entered, who infeoffed *J. S.* who is yet seised, &c. adjudged upon Demurrer a good Bar, Cr. *Eliz.* 656. *Andrews* and *Needham*.

It sufficeth  
to assign the  
Breach as  
general as the  
Covenant is.

Lessee covenants to repair the House well from Time to Time, during the Term, and at the End of the Term to leave the same well repaired to the Lessor; and assigns for Breach, that he did not leave it well repaired at the End of the Term; the Breach is good, tho' he doth not shew in what Point it is not repaired: But if the Defendant had pleaded, that at the End of the Term he had delivered it up well repaired; then, if the Plaintiff will assign any Breach, he ought to shew in what Particular it was not repaired, so as the Defendant might give particular Answer to it, Cr. *Jac.* 170. *Hancock* and *Feild*.

Covenant to  
repair all the  
Pales (ex-  
cept Breach  
assigned);  
but shews  
not the De-  
fect was in  
the Pales not  
excepted.

The Plaintiff declares (*inter alia*,) of a Covenant to repair all the Pales of a Garden demised, (excepting the Pales on the East-Side) and assigned a Breach in not repairing the Pales *contra formam Conventionis*; but shews not that the Defect was in the Pales not excepted. Defendant pleads, He had repaired the Pales according to the Covenant, and Issue upon it, and Verdict *pro Quer.* It was moved in Arrest of Judgment, that the Breach was not sufficiently alledged, for the Defect might be in the Pales excepted, *Sed*

*non allocat*, for it shall be intended after a Verdict, who had given Damages to the Plaintiff, that the Defect was in the Pales to be repaired by the Covenant, *Et eo potius*, because the Issue was as to Repairs according to the Covenant; but it was agreed, if the Deft' had demurred, Judgment ought to have been given for him, *Sir Thomas Jones, B.R. 125.*

The Plaintiff assigned a Breach in Non-reparations; Defendant pleads, the Plaintiff all Reparations had acquitted and discharged him of all Re-Discharge of all Repara-tions pleaded. Plaintiff demurred. *Per Cur'*, this is an Acquittance and Discharge of the Reparations for the Time past, as well as the Time to come, and amounts to as much as if he had released that Covenant; but the Covenant being broken, that Discharge shall not take away the Action on the Obligation, which was once forfeited, *3 Leon. 69.*

Covenant upon a Lease for Years, made by the Plaintiff to the Defendant, of a Park, &c. for Five Years, if she should so long live; in which the Lessee covenants for her, her Executors and Assigns, to keep the Premises in good Reparation, and so to leave them at the End of the Term; and also to deliver to the Plaintiff (upon Notice given) Four Bucks and Four Does in Season, during the Life of the Plaintiff, in every of the said Years. And after the Expiration of the aforesaid Term of Five Years, Plaintiff brought Covenant, and assigned the Breach, because that in the End of the Term he had committed Waste, and because that after the End of the Term the Defendant refused to deliver the Deer. Now the Delivery of the Deer are during the Life of the Plaintiff, yet they are also every of the aforesaid Years, Construction.

*In fine Ter-  
min, & ad  
finem Ter-  
minum.*

and therefore it was resolved, that she shall not have them during her Life, though it be *in fine Termini*, and not *ad finem Terminum*, yet it shall be intended a Breach of Covenant ; Action well lies, *Pop. 146. Talbot ver-  
sus Sir Walter Lacer.*

In covenant to repair, Defendant pleads, That the House was burnt by Casualty ; it's no Plea, *Stiles 162. Compton and Allen.* Lessee covenants to repair a Park, and in the End of the Term to leave it sufficiently repaired. Breach *quod non reparavit*, but in the End of the Term *fecit vastum*, (*viz.*) *in permittendo* the Pale to Decay, it's good, tho' the End of the Term is an Instant of Time in which a Thing cannot be said properly to be done, yet it may be permitted, *2 Rol. Rep. 38.*

*Not repairing  
a Mill.*

Covenant, for that he let to *R. M. quoddam molendinum aquaticum in Paroch' de S. & omnia domus edificia aquas, aquarum cursus Ripas [Angl Dams] dicto molendino adjacen' spectan' & pertinen'* for Twenty one Years, and he covenanted to repair the Houses of the said Mill, the Flood-gates, &c. The Breach was assigned for not repairing of the Mill and Mill-banks, and for not leaving the Mill-stones ; and Exception was taken, because he shews not in what Vill the Millbanks were, *sed non Allocatur*, for they shall be intended to be in the same Vill where the Mill is. 2. Because it was not shewn whether it were a Corn-Mill or a Fulling-Mill, *sed not allocat'*, for all is one, the Breach being assigned for not repairing. It was also moved, that there were Three Breaches assigned, and the Defendant having demurred upon the whole Declaration, the Plaintiff ought to have Judgment for them, wherein the Breach was well assigned, and of that Opinion

nion was all the Court, for they are as several Actions, *Crok. Jac. 557. Bressey's Case.*

Covenant for not building of an House ; Defendant covenanted, that he would ~~erect~~ build, unless Three Houses upon such Land demised to him, unless he were restrained by the King's Proclamation. Defendant pleaded, such a Day and Year the King made a Proclamation to restrain Building. Plaintiff demurs, because a Proclamation was pleaded, and no Place expressed where the Proclamation was made, and so no Venue, if Issue should be joined ; also, because it is not pleaded to have been *sub magno Sigillo Angliae*, for a Proclamation binds not, unless it be under the great Seal ; and if it be denied, there can be no Issue thereupon, (but only *null tiell Record*) which cannot be, unless he pleads it to be *sub magno Sigillo*, *Cr. Car. 1 80. Keily and Manning.*

Covenant and declares upon a Lease made by the Queen to *George Baker*, and brought the Reversion to himself by divers mean Conveyances, and brought the Term to the Defendant by a *que Estate* he had by divers *que Estate.* mean Conveyances in general, *concurrentibus iis quæ in jure requiruntur*, and assigns divers Breaches in not repairing the Premisses. Defendant pleads, *non infregit Conventiones*. Plaintiff demurs, and Judgment for him. The pleading an Estate in a Term in either Person, under whom he does not claim, but is a Stranger, is good, for he is not privy to the Estate and Conveyances to a Stranger; but to plead an Estate in himself in a Term, or in any other under whom he claims, is not good.

The Plea is too general. 1. Several Breaches being alledged. 2. Two Negatives cannot make a good Issue, and the Breaches in

*Non infregit Conventiones*  
pleaded, when  
the Breach is  
*in non repa-*  
*rando.*

*non reparando, ideo non infregit, cannot be good,*  
*3 Lev. 19. Pitt and Russell.*

Declaration in Covenant broken by Assignee against an Executor, for not repairing an House and Utensils contained in a Schedule ; Assignee makes a Lease to the Testator, Schedule recited ; Assignor dies seised ; the Tenements descend to his Daughter, who married the Plaintiff.

Covenant to  
repair.

*Et dict' R. J. pro seipso, Executoribus, Administrat' & Assignat' suis, & eorum quilibet, per Indenturam praedictam convenit & concessit ad & cum dicto T. H. Hæred', Executor', Administrator', & Assignat' suis, quod ipse dict' R. J. Executor', Administrator', & Assignat' sui, aliquis aut unus eorum de tempore in tempus, durante continuacione dictæ Dimissionis ad ejus & eorum sive aliquius eorum propria Custodia & Onera bene & sufficien' repararent, manutenerent & custodirent, dictum Domum, & dictam Wharfam, & omnia Fernacem Cisternas & Vasa, [Anglice, vocat' Coolers,] tunc existen' in & super dicta Præmissa, & omnia alia, Cisternas & Vasa, [Anglice, vocat' Coolers,] quæ postea erect' essent in fradic' Præmissa seu aliquam partem inde & res per Indentur' præd' dimiss' & mentionat' in Schedula indentat' dictæ Indenture annex' & omnia palos fensuras & inclusur' dict' dimiss' præmissis pertin' in bon' & sufficien' reparationibus & eadem præmis' sic bene & sufficien' repararat' manutent' & custodit' in fine dicti Terminii per dict' Indenturam concess' forisfatur' sive al' Determinatione dictæ Dimissionis reliquerent & sursum redderent dicto T.H. Hæred' sive Assignat' suis. Et præd' W. D. in facto dicit quod præd' R. J. virtute Dimiss' præd' intrauit, &c.*

E

Et idem W. D. ulterius in facto dicit quod post Breach as.  
confection' Indentur' præd' & ante expirationem signed.  
præd' Terminii & durante continuatione dict' Di-  
miss' (viz.) primo Die Martii Anno Dom' 1657.  
Magna pars Domus præd' discooperata fuit pro def'  
Tegulationis, [Anglice, Tiling,] per quod Tig-  
ni [Anglice, the Rafters,] & trabes & maret-  
rium Domus præd' putrid' ruinosa & in magno  
decasu devenerunt & maretium & subfruc-  
tiones, [Anglice, Underpianings,] Domus præd'  
fract' fuer' & in magno decasu pro defectu Repa-  
rationis & Emendationis. & Afferes, [Anglice,  
Boards,] omnium camerarum Domus præd' di-  
rupt' & putrid' fuer' & in magno decasu devene-  
runt pro defectu Vitreationis, [Anglice, Glazing,]  
& Emendationis & Wharfa prædicta parcell' Di-  
miss' præmiss' pro defectu Afferum & Lignariorum  
[Anglice, Planks and Piles,] ruinosa & in mag-  
no decasu fuit, & reparacione & emendatione  
magnopere indigebat. Et pali & sepes, (viz.)  
quadraginta perticæ palorum & octoginta parti-  
cat' sepium præd' dimiss' præmiss' spectan' &  
pertinen' fract' & prostrat' & in magno decasu  
fuer' pro defectu Reparationis & Emendationis,  
& adtunc scil' Die & Anno ult' supradictis for-  
nax præd' ac præd' Vasa [Anglice, Coolers,] in  
Schedula præd' Indentur' præd' Annex' mentionat'  
adtunc & tempore confectione Indentur' præd' Do-  
mui præd' annexat' & parcell' liberi Tenementi  
ejusdem Domus existen' fract' & in magno decasu  
fuer' pro defectu Reparationis & Emendationis.  
Et Cisternæ & Canales, [Anglice, Gutters,] in  
eadem Schedula si liter mentionat' adtunc & tem-  
pore confectionis Indenture prædictæ Domui præd'  
annexat' & parcell' libri Tenementi ejusdem Domus  
existen' fract' fuer' & in magno decasu pro de-  
fectu Reparationis & Emendationis prædicto que  
R. J. onnia & singula Præmissa præd' sic irre-

## The Law of Covenants.

parat & in decasu in fine termini præd' esse permisit contra formam & effectum Conventionis præd'. Et sic idem W. dicit quod nec præd' R. J. in vita sua nec præfat' T. H. post ipsius R. J. mortem licet sepius requisit', &c. conventionem præd' de eo quod præd' R. pro seipso, and so recite the Covenant ut supra, to Assignat' suis præfat' W. D. & A. Uxor ejus in Vita ejusdem Annæ sive eidem W. D. post ejusdem Annæ mortem seu eorum alteri tenuerunt seu eorum alteri tenuit sed infregeret & illi eadem W. D. tenere præd' R. J. in vita sua & præd' T. H. post ipsius R. J. mortem omnino contradixerunt & præd' T. H. adhuc contradicit ad damn' ipsius W. D. &c. & inde, &c.

Bar, quod dis-  
cooperaturam  
messuagii quod  
fuit reparat'  
de tempore in  
tempus, &  
traverse le  
Breach.

Et modo ad hunc Diem scil' Diem Mercurii prox' post Oct ab Sancti Hillarii isto eodem Termino usq; quem Diem præd' T. H. habuit licentiam ad billam præd' interloquend' & tunc ad respond', &c. coram Dom' Rege apud Westm' vener' tam præd' W. D. per Attornat' suum præd' quam præd' T. H. per T. B. Attorn' suum. Et idem T. H. Deff' vim & injur' quando & dicit.

Quod actio non quia quoad fraction' conventionis præd' in præd' discoopertura domi præd' pro defectu regulationis inde in narratione præd' superius in ea parte mentionat' idem T. H. dicit quod Domus præd' de tempore in tempus & ad omnia tempora durante Termino præd' nec non ad finem ejusdem Termini per præd' Indentur' superius concess' bene & sufficienter reparat' manutent' & custodit' fuit secundum formam & effectum Conventionis præd' R. J. in ea parte prædict' absque hoc quod magna pars Domus prædict' discooperta fuit pro defectu regulationis inde modo & forma prout præd' W. D. superius versus eundem T. H. Plea, al auter inde narravit & hoc parratus est verificare, &c. part de Breach. Et quoad præd' fractionem Conventionis præd' in præd'

præd muris & subtractionibus præd Domus pro defectu Reparationis & Emendationis inde in narratione præd superius in eâ parte mentionat' idem T. H. dicit quod muri & subtraction' Domus præd de tempore in tempus & ad omnia tempora durante Termino præd nec non ad finem ejusdem Termini per Indentur'. præd superius concess' bene & sufficien' reparat' manutent' & custodit' fuer' secundum formam & effectum Conventionis prefai' R. J. in ea parte præd absq; hoc quod præd muri & subtractionis Domi præd vel aliqua eorundem fuer' fract' & in magno decasu pro defectu Reparationis & Emendationis inde modo & forma prout præd W. D. superius versus eundem T. H. inde narravit & hoc paratus est verificare, &c. (and so of Seven more Pleas to the Particulars,) unde petit judicium pærcludi; non debet quia quoad Replie'. præd placitum præd T. H. modo & forma præd superius in eâ parte placitat' quoad præd discooperatur' Domus præd pro defectu regulationis inde in narratione præd superius in eâ parte mentionat'. Idem W. D. ut prius dicit quod magna pars Domus discooperta fuit pro defectu regulationis inde modo & forma prout ipse idem W. D. superius inde narravit. Et hoc petit quod inquiratus per patriam & præd T. H. inde sîliter, &c. And so the Plaintiff replies several to all the Pleas, and takes Issue upon the Traverse. Exitus.

## Covenant for Reparation ; where to be tried.

Declares of a Lease made in *Hampshire*, of a Messuage in *Berkshire*, and assigns a Breach Breach Local<sup>1</sup>. for not repairing an House. Defendant pleads, *Non infregit conventionem*, and Issue was tried in *Hampshire*, where it is supposed the Covenant is made. Verdict *pro Quer.* Moved in Arrest, that it ought have been tried in *Berkshire*, where the House is, and the Repairs to be made, and so *per Cur'*, it ought to be. The Breach is in not repairing, and the Issue is *non infregit conventionem* : This shall be intended only in answer to the Breach, (*viz.*) That he had not broken the Covenant for want of Repairs, and so this is the only Matter triable, and only where the House lies, *1 Lev. 114. Gilbert and Martin, 1 Keb. 575, 601. mesme Case*, the Plaintiff has made his Breach Local in not repairing, and the Issue *non infregit conventionem*, refers specially to that. This is a Special Issue, as well as if the Defendant had pleaded that the House was in good Repair, *Ray. 85. mesme Case, 1 Sid. 157.*

Assignment and paying the Rent by the Assignee to the Plaintiff ; the Reversioner is no Plea, for the Assignee and his Executors are chargeable with the Breach of this Covenant, so that neither by the Assignment over of his Estate, nor by any A&t he can do, can he discharge himself or his Executor having Assets, so long as the Lessor continues the Reversion in him ; and tho' he assigns it over, his Assignee shall have it, for the Executors are not chargeable by Privity of Contract, but by the Covenant it self ; and by the ex-

press Words of the *Stat. 32 H. 8.* it being a Covenant in *Fait*, which runs with the Land. *Aliter*, of a Covenant in Law, or of a Rent which is created by Reason of the Contract, and it is by Reason of the Profits of the Land, wherein none is longer chargeable with them, than the Privity of the Estate continues with them, *Cr. Jac. 521.* *Brett and Cumberland, Cro. Car. 58.* and therefore in Covenant to repair within a Month after Warning. Defendant pleads, long Time before that Warning he assigned over to *J. S.* who had always after paid his Rent; and the Plaintiff accepted it, and avers Performance of all the Covenants till the Assignment. It's an ill Plea, for he may charge the Lessee or Assignee at his Election, *Cr. Jac. 309. Bernard and Godscall.*

Lease to Baron and Feme, and they covenanted to do no Waste, or to repair Houses. Baron dies, Feme surviveth and holds in; if the Wife commit Waste, or not repair the Houses, no Action lies against the Wife, for to such a Lease the Wife is tied to pay the Rent, or to perform a Condition made by the Part of the Lessor, but not to observe or perform Covenants of the Lessee, *1 Brownl. 31.*

Covenant to repair an House; if Lessee comes after the Term without Licence to repair it, he is a Trespassor, *2 Rel. Rep. 250.*

Lessee for Years covenants at the End of the Term to leave and yeild up the Tenements well repaired to the Plaintiff; and the Breach was, that he had not left it so. Defendant pleads, that one *Blunt* was seised in Fee until by the Plaintiff disseised, who let to the Defendant; and after *Blunt* re-enter'd, who enfeoff'd *J. S.* who is yet seised, and on

## The Law of Covenants.

on Demurrer held a good Bar, Cr. El. 656, Andrews and Needham. This Case before.

The Breach was, That the Defendant did not repair. He pleads generally, *Quod reparavit*, this was held a good Issue after a Verdict, 2 Mod. 176. Harman's Case.

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### C H A P. XIX.

*Covenant that he had good Power and lawful Authority.*

COUNT is, That Bradshaw, by his Indenture dated, &c. demised to John Salmond divers Lands and Tenements in S. for the Term of Six Years, if R. R. Son of N. R. should so long live, and covenants by the same Indenture with Salmond, that the said Bradshaw then had full Power and lawful Authority to demise the Premisses according to the Form and Effect of the same Indenture. Salmond for Breach of the said Covenant in Fact, saith, that Bradshaw at the Time of the making the said Indenture had not full Power and lawful Authority to demise the Premisses according to the Form and Effect of the said Indenture, *Et sic præd' Robertus conventionem suam præd' cum eodem Johan in hac parte non tenuit sed illam penitus infregit.* Bradshaw pleads Concord, &c. Salmond denies the Concord, and it was found for him. Bradshaw brought a Writ of Error in the Exchequer-Chamber, and assigns Two Errors for the Insufficiency of the Court. 1. That the Plaintiff had not averred that the said R. R. was living at the Time of the Commencement

ment of the Lease, nor at the Time of the Action brought, *Sed non allocatur*, for the Covenant refers to the Time of the Lease made, and then, be R. R. alive or dead the Action lies; for if he be dead before the Lease, then the Lease is absolute; and if he dies after the Lease, and before the Action brought, yet the Action lies, and Consideration thereof shall be had in Damages.

2. That *Salmond* in his Count had not shewed what Person had Estate, Right, Title, or Interest in the Lands demised at the Time of the making the Indenture, by which it may appear to the Court, that *Bradshaw* had not full Power, &c. But *per Cur'*, the Assign-  
Breach.  
ment of the Breach is good, for he had per-  
sued the Words of the Covenant Negative,  
and it lies more properly in the Notice of the  
Lessor what Estate he had in the Land, than  
the Lessee who is a Stranger to it; and there-  
fore the Defendant ought to shew what Estate  
he had in the Land at the Time of the Demise  
made, by which it may appear to the Court  
that he had full Power and lawful Autho-  
rity, &c. 9 Rep. 60. b. *Robert Bradshaw's Case*,  
*Cr. Jac. 304 mesme Case*, 1 Cro. 176. other-  
wise in Debt upon an Obligation with Con-  
dition to perform Covenants, *Cro. Car. ibid.*

## C H A P. XX.

Vid. 1 Kib.  
937.

*Covenants for quiet Enjoyment. Pleadings. Eviction or Disturbance how to be pleaded; or what amounts to a Breach of the Covenant, in respect of the Word Construction.*

*Eviction or Disturbance, how to be pleaded.*

*By Breach of  
Covenant in  
Law the Ob-  
ligation is  
forfeited.*

*Eigne Title.*

**T**H E R E is a Diversity between a Covenant in Law and an express Covenant. The Defendant leased to the Plaintiff an House by the Words, [Demise and Grant,] which Words import a Covenant in Law; and the Lessor covenanted, that the Lessee shall enjoy the House during the Term, without Eviction by the Lessor, or any claiming under him, (which express Covenant was narrower than the other) and gave Bond to perform Covenants. The Plaintiff grants this Term over to a Stranger. The Plaintiff assigned for Breach, that one S. entered upon the Assignee, and in Ejectment recovered against the Assignee. Debt was brought. *Per Cur'*, by this Covenant in Law the Assignee shall have a Writ of Covenant, and for this Breach of the Covenant in Law the Obligation was forfeited. But because the Plaintiff did not shew that S. had an *Eigne Title*, (for otherwise the Covenant in Law was not broken) therefore Judgment against the Plaintiff, 4 Rep. 80. b. Nokes's Case, Cr. El. 674. *mesme* Case. And,

Regularly no Covenant lies upon the Word, [Demisi,] unless in Case of Eviction of Lessee, and actual Ouster or Expulsion by the Lessor or a Stranger.

*D. was*

D. was bound to H. upon Condition that H. and his Heirs might enjoy certain Copyhold Lands surrendered to him; the Defendant pleads the Surrender, and that the Plaintiff entered, and might have enjoyed the Lands. Plaintiff replies, that after his Entry one E. entered upon him and ousted him.

*Per Cur'*, the Replication is ill, because he did not shew he was evicted out of the Land by lawful Title, for else he had his Remedy against the wrong Doer, *Vaughan* 121, 122.

Shew Eviction by lawful Title, and why.

*Hammond's Case.*

The Condition was, that he should enjoy such Lands without Eviction: The Breach was assigned in the Recovery by Verdict in Ejectment, upon a Lease made by one *Essex*, and shews not what Title *Essex* had to make the Lease, but avers that *Essex* had good Title, and it might be he had Title derived from the Plaintiff after the Obligation made, and therefore he ought to shew that he had good and eigne Title before the Lease made; and in the Exchequer-Chamber the Replication was held ill, *Cr. Jac.* 315. *Kirby and Hansaker*, 2 *Sand. Hele and Wotton*, 177, 178. 1 *Lev.* 301. 2 *Lev.* 37. *Moo.* 861. *Hob.* 34. Tho' this was after a Verdict.

Covenant and declares, that the Defendant let to him such Land, and covenanted to save him harmless against all Suits, *Evictions*, or *Expulsions*. Defendant pleads, *J. S.* ousted him by an *hab' fac' possession*: Plaintiff demurs: The Plea is ill, for Two Causes; 1. Because he pleads Expulsion by an Execution, without shewing any Judgment: He ought to have said, that *J. S.* brought Ejectment, upon which *taliter processum fuit quod consideratum fuit*, that he shall recover; and upon this

Expulsion by Execution pleaded.

Covenant extends to  
Expulsion upon eigne Title.

Plead he had  
performed  
the Covenants  
*ex parte sua*  
*per implend'*.

Quietly to  
enjoy with-  
out Distur-  
bance of him,  
&c. or any  
other Person  
by or through  
his Means, Ti-  
tle or Pro-  
curement.

this sued an *hab' fac' possession'*. 2. He ought to have shewed that *J. S.* had legal Title before the Lease, upon which he brought the Action; for the Covenant doth not extend but to Expulsions upon *eigne Droit*, and perhaps in this Case *J. S.* might recover by Virtue of a Lease made to him by the Plaintiff himself, 1 *Lev. 83. Nicholas and Pullin*, 2 *Keb. 379.*

One covenants with *J. S.* that he shall enjoy the Land; and farther, that *A. a Farmer of the Tythes*, shall pay *8 l. per Annum*, and is bound to Performance. In Debt on the Bond, it is good to plead Performance of the Covenants, *ex parte sua per implend'*, for this implies the Farmer had paid the *8 l.* and express Mention of that need not to be, *Dyer 23 El. 372, 373.*

Plaintiff declares, that Sir *John Swinnerton* let to him, &c. and covenants, that the Plaintiff should quietly enjoy it during the Term, without the Let or Disturbance of him, his Heirs or Assigns, or of any other Person by or through his *Means, Title or Procurement*; and shews for Breach, that the Lord Peters by Fine granted the Land to Sir *John Swinnerton* and his Wife (the Defendant), and to the Heirs of Sir *John*, and that this Fine was so levied by *the means of Sir John*, and that after he made the Lease to the Plaintiff, Sir *John* died; his Wife enters, who was *Excutrix*. *Per Cur'*, the Action lies; tho' she claims by Title derived from another, yet she claims by *his Means*, Cr. *Jac. 657. 2 Rol. Rep. 286. Butler versus Lady Swinnerton.*

For tho' in Point of Estate the Wife was in by the Lord Peters, yet this was by Means of the Purchase and Procurement of her Husband, for this was procured to make her a Join-

a Jointure. And if he make a Lease, and Lessee grants it over, and after he makes a second Lease with such Words ; if this Lessee be ejected by the Assignee of the first Lessee, it is a Breach of the Covenant, because this is by Means of the Covenantor, altho' not *his Act* : And this Covenant provides as well against lawful Entries by *his Means and Procurement*, as against tortious ; and this Word [Title,] does not refer to Disturbance, but to Estate. Tenant in Tail makes a Lease, and covenants that the Lessee shall enjoy against him and all claiming under him ; if he dies, and his Issue ousts the Lessee, the Covenant is broken : For tho' he is in *pro formam Doni*, yet it is by Descent from the Father, and so by *his Means*, tho' not *his Title*. But if the Issue make such a Lease and Covenant, and the Issue of the Issue enter, it is not broken, because he is not in by *his Means*, but by *descent*, which is by *Act in Law & per formam Doni*, Palmer 339, 340. The Lady Swinnerton's Case.

Assignee brings Covenant against the Signor for being disturbed in Non-enjoyment quietly. Defendant pleads 40*l.* accepted of him in Discharge of the Wrong : After, Assignee brings Covenant against the Executor of the Lessor, who pleads this Acceptance : It's no Plea. Had he pleaded the Acceptance of the 40*l.* in Satisfaction of the Covenant, it might have been good, Stiles 300. Whitway and Pinsent.

Lessor, Tenant for Life, lets for Twenty one Years, and covenants that he had not done any Act to prejudice the said Lease, but that he should enjoy it against all Persons. Tenant for Life dies, the Lessor in Reversion enters :

Where the Words extend against lawful Entries as tortious Entries.

40*l.* accepted in Satisfaction pleaded.

## The Law of Covenants.

[For any Thing  
done by them]

how extends-

Diversity be-  
tween [du-  
ring the  
Term] and  
[during the  
Term of  
so many  
Years.]

enters : Lessee sues the Executors. The Action lies not, for the last Words refer to the first Words, [for any Thing done by him,] Cr. Eliz. 615. Garvis and Pead.

If Tenant for Life makes a Lease for Twenty Years, and covenants that the Defendant shall enjoy it during the Term, that shall be construed during his Life, for the Term endeth by his Death. *Aliter*, if the Covenant had been during the Term of Twenty Years, 1 Brownl. 22. Brag and Wiseman.

Covenant was, that the Lessee and his Assignees should enjoy it, without the Let or Interruption of F. E. and all others claiming under the said F. E. The Breach assigned was, because he was ousted by J. S. who claims under the Title of F. E. and does not shew how he claims under his Interest, nor by what Conveyance : It's ill, tho' he be a Stranger, Cr. El. 823. White and Ewer.

What Suits amount to a Breach of Covenant for quiet Enjoyment ; Vid. *Breach as to Suits.*

Vaughan 118. in Bickerstaff and Hays's Case, is very plain what the Law is.

All Covenants between the Lessor and the Lessee are Covenants in Law, or Express. By Covenant in Law, the Lessee is to enjoy his Lease against the lawful Entry, Eviction or Interruption of any Man, but not against tortious Entries, Evictions or Interruptions ; and the Reason of the Law is clear and solid, because against tortious Acts the Lessee hath proper Remedy against the wrong Doers ; by the same Reason, if the Lessee be by express Covenant to enjoy the Term, (or to enjoy it against all Men, which is the same) he shall not have Action of Covenant against the

the Lessor, unless he be legally ousted or evicted; for if he is ousted tortiously by any Stranger, he hath legal Remedy; but if the Lessor expressly covenants that the Lessee shall enjoy his Term without the Entry or Interruption of any, whether such Entry and Interruption be lawful or tortious, there the Lessor shall be charged by Action of Covenant for the tortious Entry of a Stranger, because no other Meaning can be given of the Covenant.

*Elias Tisdale* brought Covenant against Sir *William Essex*, and declared, that Sir *William* covenavit permisit & agreeavit ad & cum praed' *Elias*, quod ipse idem *Elias*, haret' occuparet & gauderet, certain Lands for Seven Years into which he entered, and one *Elsing* had ejected him, and kept him out ever since. Resolved, because no Title is laid in *Elsing*, he shall be taken to enter tortiously, and the Lessee hath his Remedy against him: Therefore Judgment was for the Defendant *Essex*.

So that neither upon Covenant, Assumpsit, or Action of Debt on Bond for quiet Enjoyment, unless the Breach be assigned for a lawful Entry and Eviction, an Action of Covenant cannot be maintained.

If Lessor covenants against himself, his Executors, Administrators and Assigns, the Lessor is not to be charged with the tortious Acts of his Assignee.

If a Man covenants for Enjoyment against a particular Person or Persons, he covenants as well against their tortious Entries as legal, Hob. p. 34, 45. Vaughan 118. Cr. El. 212, 213. 1 Rol. Rep. 397. Moo. 867.

The Covenant was, That the Covenantee should peaceably enjoy an Acre of Copy-hold Land, according to the Custom of the Mannor. The Defendant pleads, by Custom of the Mannor the Covenantee ought to pay to the Lord a Rent, and for Non-payment the Lord to re-enter ; and that the Covenantee did not pay it, and the Lord entered and demanded Judgment *si Actio* : A good Plea. *Bendl. p. 32.*

Covenant to  
save harmless  
from lawful  
Eviction.

*Debito modo  
exeun'.*

A Covenant was to save harmless from lawful Eviction ; Defendant pleads Performance. Plaintiff replies, that *J. S.* took out a Writ of *Hab. fac' possession' in B. R. Debito modo exeun'*, and by Virtue thereof expelled him. *Per Cur'*, *Debito modo* is not sufficient, without shewing Particulars ; he ought at least to recite the Term of the Judgment, but not the Title of him that evicted, *1 Keb. 379. Nicholas and Pullen*, and *1 Lev. 83.*

A Condition peaceably to enjoy from the *1 Febr. usque Michaelmas-Day*, Tythes, paying half yearly during the Term, and on Default of Payment, the Defendant (Lessor) to be free from all Obligation to the Plaintiff. He replies, and assigns a Breach in Non-payment of Rent at *Michaelmas*, which is after the Term ended : And Defendant demurs. Now the Substance of the Suit is, quiet Enjoyment, and therefore ought not to be taken by Protestation. *Sed per Cur'*, Enjoyment need not be answered where it's defeasanced by Payment of Rent, yet Judgment *pro* Defendant, *3 Keb. 550, 594. Biggin and Bridg.*

Where En-  
joyment need  
not be answe-  
red.

A Condition to perform Covenants in a Lease ; one was, that he should enjoy such Lands let to him quietly, without Interruption. And the Plaintiff in his Replication sheweth *in facto*, that the Defendant *20 March, 30 El.* had disturbed him, and in that assigned the Breach. The Defendant by Rejoinder sheweth, that in the Indenture there was a Proviso, that if he paid *10 l.* the *31 March, 30 El.* that the Indenture and all therein contained should be void, and alledged he paid *10 l.* at the Day (but this was after the Disturbance supposed). Plaintiff demurs : Judgment *pro Quer.* For by the Covenant broken before the Condition performed, the Obligation was forfeited ; and it is not material that the Covenant became void before the Action brought ; but by *Wray*, if the Proviso had been, that upon the Payment of the *10 l.* that then as well the Obligation as the Indenture should be void : *Aliter*, for then the Bond was void before the Action brought, *Cr. El. 244. Hill and Pilkington.*

By Covenant  
broken be-  
fore the Con-  
dition perfor-  
med, Oligi-  
tion is for-  
feited.

Tenant in Tail, Reversion to the Queen in Fee , lets it for 21 Years by Indenture , and covenants that the Lessee shall enjoy it against all Persons , without the Interruption of any besides the Queen, her Heirs and Successors ; the Queen grants her Reversion to *W.* Tenant in Tail dies without Issue. *W.* enter : Lessee brought Covenant. It lies, for the Queen's Patentee is not excepted, *Cr. El. 517. Woodrast and Greenwood.*

There was a Covenant in an Assignment of a Lease, that the Assignee should quietly enjoy, &c. free and clear of and from all Arrears of Rent : An Action was brought upon

this Covenant, and the Breach assigned was, that the Rent was Arrear and not paid. The Defendant pleaded, he left so much Money in the Hands of the Plaintiff, *et intentione*, to pay it to the Lessor in discharge of what Rent was then in Arrear: And upon Demurrer the Plea was held good, notwithstanding the Objection that the Intention was put in Issue; for if it had been *ad solvend'*, it had been good, and in this Case the Plaintiff might have replied, *non reliquit, &c. in Manibus suis ad solvend'*, 4 Mod. 249. Griffith and Harrison.

Covenant to save harmless from Eviction, in a Lease dated long before the Delivery, shall extend to Eviction before the Delivery.

Covenant was brought upon Indenture of Lease for Nine Years, dated 1 Jun. 16 Car 2. which was to save the Plaintiff harmless of all Evictions during the Term, and the Breach assigned was Eviction, 26 June, 16 Car. 2. Defendant pleads, that the said Deed was *primo deliberat'*, 1 July, 17 Car. 2. which was after the Breach assigned; and pleads further, that the Plaintiff was not ejected after the Delivery of the Deed: Upon which the Plaintiff demurs. *Et per Cur'*, these Words, [during the Term,] shall be continued during the Term in Computation, and not only from the Time of the Delivery of the Deed, when it commenceth in Point of Interest; and so Judgment was given for the Plaintiff, Sid. 374. Lewis and Hillard, Cr. Jac. 263. Offley versus Sir Bap. Hicks.

If the Lessor covenants with his Lessee, that he hath not done any Act to prejudice the Lease, but that the Lessee shall enjoy it against all Persons: These Words, [against all Persons,] shall refer to the First, and be limited and restrained to any Acts done by him, and no Breach shall be allowed but on such an

Act,

*Act, Jarvis and Pead, Mts. 40. & 41 Eliz.*

*B. R. 5 Rep. 17. &c. 22 H. 6. 52. Dier 257.*

Debt on Bond to perform Covenants; one Not to be interrupted in his Possession of certain Lands by any Person that had lawful Title, and particularly, that he should not be interrupted by one *Thomas Antony*, by virtue of any such Title. Defendant pleads Performance. Plaintiff replies, 1 Nov. 20 Car. the Defendant made the Lease to the Plaintiff, and 3 Nov. he entered; and that 17 Aug. 20 Car. before the Defendant made a Lease to *Antony* for Years yet to come, who 20 Aug. 20 Car. entered. The Defendant pleads, the Lease to *Antony* was on Condition of re-entry for Non-payment of Rent, and that before the Lease made to the Plaintiff the Rent was behind, and *Legitime demandat' secundum formam indentura*; and he re-entered and made the Lease to the Plaintiff upon general Demur-  
rer. *Per Cur'*, the Demand was not sufficiently alledged, for he ought to set forth when and where it was made, that the Court might know if it were Legal. But for a Flaw in the Plaintiff's Replication, because he alledged his Entry after the Lease made to *Antony*, so that it appears not he was interrupted by him, the Opinion of the Court was against the Plaintiff, *Allen p. 19. Coleman and Painter.*

*Johnson and Vavasor*, Joint-Tenants of a Mill by Lease for Years; *Vavasor* assigns all his Interest in the Mill to another, without *Johnson's Assent or Privity*, and dies. *Johnson* after recited this Indenture by Lease, and that all came to him by Survivorship, grants the Mill, and all his Estate, Title and Interest, to

## The Law of Covenants.

Covenant for quiet Enjoyment, notwithstanding any Act done by him.

Condition to perform all Grants.

*Proctor*, and covenants that he shall quietly enjoy it, notwithstanding any Act done by him, and Bond for Performance of Covenants. In Action of Debt on the Bond, *Johnson* pleads, that the Plaintiff had enjoyed it, notwithstanding any Act done by him. *Proctor* replied, that *Vavasor*, Joint-Tenant with *Johnson*, assigned his Estate to *J. D.* who entered and expelled him. The Defendant demurs : And adjudged against the Defendant ; for the Grant was never good, for he had no Power to grant one Moiety, and yet he had expressly granted the Mill to *Procter* ; and the Condition of the Obligation being to perform all Grants, the Grant being defective at the first as to a Moiety, which is the Substance of the Agreement of all the Parties. This is not qualified by the Covenant ensuing, and it is not like to *Nokes's Case*, 4 Rep. for there the Grant was good for the whole, and becomes ill by Eviction afterwards, and therefore in that Case the Covenant ensuing qualified the general Covenant, *Yel. p. 175. Litt. 206. 1 Bulst. 3, 4. Procter and Johnson, 2 Cro, 233.*

If one covenants to enter into Bond for the quiet enjoying of Land, and doth not say what Bond, in this Case it shall be taken to a Bond of so much as the Land to be enjoyed is worth, 5 Rep. 78. a.

In Debt on Bond to save harmless from lawful Evictions ; Dower being recovered after Bar by Fine and Non-Claim, without Exception to it, which might have been taken ; it was held no lawful Eviction, and so the Defendant found not guilty, for the Plaintiff must sufficiently intitle himself, *Allen and Thorn cited, 1 Keb. 379,*

Conuseo

Conusee of a Statute extends and assigns it to one, and after grants the Land to another, and covenants, that notwithstanding any Act by him, or any other by his Consent, that the Statute Extent and Execution shall be in force, and in Covenant brought by R. This Assignment was assigned for Breach, and upon Demurrer, adjudged *pro Quer'*. And now in Writ of Error this Judgment was reversed, for notwithstanding the Assignment, the Statute is in force; but if the Plaintiff *eo quod concessit* to him, which implies a Covenant, the Action had been maintainable: But the Breach is assigned in the Covenant only, which is not broken by the Assignment, for the Statute is in force after the Assignment, so that the Conusee may release, 17 Ed. 3. and the Assignment proves the Statute to be in force; but if he had covenanted, that the Grantee shall enjoy without Disturbance, the Assignment had been a Breach of the Covenant; and so is a Breach of Covenant in Law implied in the Word [Grant,] if the Action [Grant.] had been brought upon it, *Palm.* 388. Person's Case.

*What amounts to Eviction, Interruption, or Disturbance, or not, in respect of Words and Construction.* Vid. sub Titulo, *Breach by Suits,*

The Words, assign, set over, and transfer, [*vendidit, assignavit & transfluit,*] do not amount to a Covenant against an Eigne Title, [*vendidit, assignavit, & transfluit,*] yet against the Covenantor himself it will amount to a Covenant; as a Covenant against all claiming by, from, or under me; *per Hales,* 2 Keb. 304. As for the Word, [Demisi,] Vid. supra.

## The Law of Covenants.

That he forbade his Tenant to pay Rent assigned for a Breach.

How far the Word [defend] extends.

The Servant by Command enters and cuts down Trees.

Lessor himself etly to enjoy the Land, and that the Lessor ousts the Lessee.

[Suffer.] how far it extends.

Debt on Bond to perform Covenants ; the Covenant was for quiet Enjoyment, without Let, Trouble, or Interruption, &c. The Plaintiff assigned his Breach, that he forbade his Tenant to pay his Rent. *Per Cur'*, it's no Breach, unless there were some other Act, *1 Brownl. 81. Whichcatt and Linesey versus Nine.*

The Condition was, If the Defendant warrant and defend an Oxbgang of Land to the Plaintiff, against J. S. and all others, that then, &c. Resolved that the Word [defend,] shall be taken as a Defence against lawful Titles, and not against Trespasses, *More N<sup>o</sup>. 294. Crocock and Whitem.*

The Covenant was to enjoy peaceably against M, Breach was assigned, that M. had entered and cut down Five Elmes ; upon Evidence it was, A. Servant of M. by Commandment, and in the Presence of his Master, had entered and cut, and good, *1 Leon. 157. Seaman and Browning.*

Debt on Obligation for Performance of Covenants ; the Breach assigned was, The Defendant, Lessor, covenanted that it should be lawful for the Plaintiff, being Lessee, qui- lessor himself ousts the Lessee.

The Condition was, That he shall suffer his Lessee for Years to enjoy, &c. and that without the Trouble of him or any other Person, a Stranger enters by Eigne Titte. The Condition is not broken, for this Word, [Suffer,] is a Passive, and all the rest is to be referred to it ; but if any Procurement or Occasion of Disturbance be by the Lessor, his Executors or Assigns, then he forfeits the Obligation, *2 Ed. 4. 2 b. 1 Rol. Abr. 425.*

Debt to perform Covenants in a Lease; one was for quiet Enjoyment against all claiming Title. The Plaintiff assigns for Breach, that a Stranger entered, but saith not *habens Titulum*; *Hales, habens Titulum* at that Time Claiming Title, would have done. *Dier's Case* is, another entered claiming an Interest, but that is not enough, for he may claim under the Lessee himself. If the Covenant had been to save him harmless against all lawful and unlawful Titles, yet it must appear that he that entered did not claim under the Lessee himself,

*1 Mod. 101. 3 Keb. 246. Norman and Foster, Hob. 34. Tisdale and Essex, Moor 861.*

Covenant was; Whereas the Plaintiff was in Possession of such Lands, that neither J. S. nor J. D. nor J. G. should disturb him by any indirect Means, but by due Course of Law. Defendant pleads, that *nec J. S. nec J. D. nec J. E.* did disturb by any indirect Means, but by due Course of Law: It's not good, but a Negative Pregnant. If he had pleaded he was not disturbed by any indirect Means, it had been good. If he had said, that he had not been disturbed *contra formam conventionis p̄d*,

*Godb. 60. Digbton and Clark, 2 Leon, 197.*

One covenants, that he shall enjoy against him and *Vaulore*, and all claiming under him, and assigns a Breach that *Coke* claims under *Vaulore*, and ejected him. Defendant pleads, that at the Time of the Covenant he was seised of an Indefeasible Title, and that by an A& of Parliament made after reciting that *Vaulore* had settled this Estate in Lady *Mary Powell*, and that certain Persons had unduly procured a Fine of her; it enacts, that the Fine shall be void, and that any Person might enter as if no Fine had been levied;

and

## The Law of Covenants.

and that by Vertue of this Fine, & non aliter, the Defendant was seised, and sold and made the Covenant. And that after the Act Croke claiming by Title under the said Lady Powell by *Vaulore's Settlement*, by Vertue of the said Act of Parliament entered and ousted him. Plaintiff demurs, for that the Title being good at the Time of the Covenant made, and the Title upon which the *Ouster*, it being by Act of Parliament, it's no Breach, as *9 Rep. 106. Dame Gresham's Case*: But *per Hales and Rainsford*, this Act doth not make a new Title, but removes an Obstruction from the old, and doubtless *Vaulore* was named in the Covenant for this Purpose, in case this Fine unduly obtained should be avoided. *Twisden contra. Q. 2 Lev. 26. Lucy and Lewington, 1 Ventr. 175. and 2 Keeble 831. mesme Case.*

Lessee for Twenty one Years rendring Rent, with a Condition to re-enter, &c. Lessee leaseth Parcel to the Plaintiff for a less Term, and under a less Rent, with this Special Covenant, That the Plaintiff should enjoy without Impeachment of him or any other occasioned by his Impediment, Interruption, Means, Procurement, or Consent. Defendant paid not the Rent, and his Lessor enters into the whole, and avoided the Plaintiff's Term. *Per Cur'*, it's a Breach, *1 Bulst. 182. Stevenson and Powell.*

The Plaintiff by Deed indented leased to the Defendant a Farm called *D.* except one Close by Name. Lessee (Defendant) was bound in a Bond to perform all the Covenants and Agreements in the said Indenture, and pleaded he had performed all the Covenants. The Plaintiff assigns for Breach, that  
the

the Defendant entered into the Close excepted: Defendant demurs. The Obligation is not forfeited by this Disturbance, for the Land excepted is not named. This Exception is not such an Agreement as is within the Intent of the Condition, it's an Agreement that the Land excepted shall not pass by the Demise, but no Agreement that he shall occupy; but in some Cases, an Exception is an Agreement that shall charge the Lessee, but this is when he agrees on his Part, that the Lessor shall have a Thing debors, which he had not before, as except a Way or Common, or any other Profit Appreder, that is, an Agreement of the Lessee that he shall have the Profit; and if he be bound to perform all Covenants and Agreements, if he disturbs him in this, he shall forfeit his Bond, Cr. El. 657. *Lady Russel versus Gullwell, More 553. mesme Case, 1 Rol. Abr. 43. Vide Plo. 67. in Dure and Manningham's Case.*

Two make a Lease for Years by Indenture, and covenant that the Lessee shall not be disturbed, nor by any Incumbrance made by them: One of the Lessors makes a Lease to a Stranger, who disturbs, on Bond to perform Covenants; it is a Breach of the Condition, for [them] shall not be taken jointly, Latch. 161. *Meriton's Case, Pop. 200. Noy. 86, mesme Case.*

A Covenant that the Lessee shall enjoy enjoy against the Lessor, and all claiming under him. The Defendant exhibited a Bill, whereby the Lessor appeared to be in Trust, and adjudged this was no Breach. *Selby and Chute cited, 2 Keb. 288. 2 Brownl. 23. Moo. 859, Cest' Case deny pur Ley, Raym. 371.*

Disturbance  
in Land ex-  
cepted, no  
Breach.  
Agreement.

Where an  
Exception is  
but this is when he agrees on his Part, that an Agree-  
ment.

[Them] where  
not to be ta-  
ken jointly.

Exhibiting a  
Bill, no  
Breach.

To enjoy  
absq; legali  
Impedimenta.  
Habens jus.

When the  
Covenant is  
to save harm-  
less against a  
Person cer-  
tain, he ought  
to defend  
him against  
the Entry of  
that Person,  
be it by Right  
or Wrong.

To enjoy *absq; legali Impedimento* of *J.S.* The Breach is, that *J. S. habens jus* entered: It is a sufficient Breach, *2 Keb. 878. Proct. versus Newton.* *Per Hales,* *habens jus* implies it a lawful Eviction, *2 Lev. 37. & 1 Ventr. 184. mesme Case.*

Covenant; is Whereas he had let to the Plaintiff the Parsonage of *B.* that he would save him harmless concerning it against *M.B.* and he alledged *M. B.* entered upon him and put him out, and saith not the Entry of *M. B.* was lawful. *Per Cur.*, when the Covenant is to save him harmless against a Person certain, he ought to defend him against the Entry of that Person, be it by Right or Wrong. *Aliter*, if against all Persons, for there it shall be taken for a lawful Entry or Eviction. Had it been to have warranted against him, it must have been a lawful Title, so that in this Case to save harmless is more than to warrant, *Crok. El. 213. Foster and Mapes, 1 Leon. 324. mesme Case.*

In Debt on Bond against Baron and Feme being made in her Widowhood, with Condition that She, her Heirs and Assigns, keep Contracts and Covenants made between her former Husband and his Lessee the Plaintiff; and there was an Agreement that the Plaintiff should enjoy a Warren of the Demise of the former Husband, and that he entered till put out by the Defendant: Issue on the Agreement, and found for the Plaintiff. It was moved in Arrest of Judgment, that there was no Estate alledged in her former Husband *in jure Uxorii*, whereby tho' the second Husband be Assignee in Law, yet he enters of his own Wrong, and not as claiming under her. But *per Windham*, it's not requisite that

that the Husband be Assignee of the Estate, Assignee of  
but her Assignee of Covenant, 1 Keb. 348, the Estate,  
§ 12. *Hall versus Creswell* and his Wife. Judg- Assignee of  
ment pro Quer'. the Covenant.

In a Lease for Years, the Defendant covenants that the Plaintiff shall enjoy it during the Term; on Demurrer the Case was, Tenant for Life levies a Fine to him in Reversion *come cœ.* &c. the Uses were to the Consee and his Heirs, on Condition to pay to the Tenant for Life 4*l. per Annum* during his Life, and upon Default, that it should be to the Use of the Conisor for her Life; the Consee made a Feoffment to the Defendant, who leased to the Plaintiff; the 4*l.* was not paid nor demanded, the Tenant *pro Life* enters upon the Plaintiff. This is a Breach of the Condition without any Demand of the Rent, for it is a Sum in Gross, and not issuing out of the Land. The Covenant is, that the Lessee shall absolutely enjoy it, and it was held that this Feoffment hath not destroyed the future Use, which is to arise for Non-performance of the Condition, Cr. El. 688. *Smith and Warren.*

Sum in Gross,  
and not a  
Rent.

## C H A P. XXI.

*Covenant for quiet Enjoyment.*

**I**F Lessee for Years assign to *J. S.* and after assigns it to *J. D.* and covenants with *J. D.* that he is posses'd of the Term, and that *J. D.* shall enjoy it, and shall be saved harmless from all Incumbrances done by him ; the first Assignment is not any Breach of the Covenant before Entry made by *J. S.* nor any Disturbance of the Possession. *1 Rol. Abr. 430. Lamb and Sir Lewis Tresham.*

Prior Assignment no Breach till Entry.

Tortious Entry by the Lessor.

Lawful Disturbance.

If Lessor covenants with his Lessee for Years, That it shall be lawful for the Lessee, &c. peaceably to enjoy the Land, and after the Lessor enters tortiously upon the Lessee, and ousts him ; this is a Breach of the Covenant, for the Intent of it was, That he should enjoy it without the Interruption of the Lessor : So it had been if the Word [*Peaceably*] had not been in the Covenant. *Hob. 49.* But if Covenant be in a Lease per Indenture, That *B.* shall enjoy the Land peaceably and quietly to his own Use, according to the Intent of the Indenture, without any lawful Impediment, Suit, Disturbance, *Eject', Contradict', Molest and Charge,* Incumbrance, or Denial of the said *A.* the Lessor, and after *A.* enters upon *B.* and disturbs him in taking the Profits, without any lawful Title, but as a Trespasser. This is not any Breach of the Covenant, for that it is expressly limited, That he shall enjoy this without any lawful Disturbance, and so a

Disturbance by Tort is out of the Covenant.

1 Rol. Abr. 429. Davy and Sacheverel. M.

11 Car. 1. But if the Lessor enters and ousts him, though it be tortiously, it is a Breach. *Tortious Entry.*  
*Cave and Brooksbys, ibid.*

If Lessor covenants with his Lessee, That he shall have and enjoy the Land, *quietè & pacifice sine evictione & interruptione alicujus Personæ*, and after an Stranger enters per Tort; yet this is a Breach of the Condition, for that the Covenant is, That he shall not be interrupted in his Possession. *Dier 328. a.* But *Hob.* in *Sir William Tisdale and Essex's Case*, is, That if Lessor covenants with his Lessee, *quod ipse b' eret occuparet & gauderet*, the Land demised, and after a Stranger enters per Tort, and ejects him; this is not any Breach of the Covenant, for the Law will not construe the Covenant to extend to tortious Acts, without express Covenant.  
2 Cro. 425. Pl. 10. & 144. Pl. 21. *Sem' cont' al Dy.*

Where if a Stranger enters by Tort, it is a Breach, or not.

Covenant upon Articles, by which the Defendant covenants, That the Plaintiff shall enjoy a Close quietly for a Year: Upon which the Plaintiff put in his Beasts, and K. who had *Titulum virtute cuiusdam dimissiones ei inde fact' ante confection' articul' prædict'*, entered upon the Plaintiff, and expelled him, and after (*scil.*, such a Term) brought Action of Trespass against him, for putting Beasts into the said Close, and that *salit' process' fuit*, that K. recovered against the Plaintiff 20*l.* Damages, and 17*l.* Costs; of which the Plaintiff had Notice, and so by the Non-quiet Enjoyment the Defendant had broke his Covenant. Issue upon this, and Verdict for the Plaintiff here. Moved in Arrest of Judgment

Disturbance  
by K. not  
shewing what  
Title K. had.

ment, for that he had not shewed what Title K. had, and it may be the Title which he had was under the Plaintiff himself; and there having been a Suit, wherein the Title of K. appeared, the Plaintiff ought to have shewed it, for now it is in his own Conscience: *Sed non sicc'*, for the Title of K. cannot be supposed to be under the Plaintiff here; for the Declaration that K. had Title by virtue of a Demise, before the Articles made to the Plaintiff; and be the Title derived from who it will, being made before the Articles with the Plaintiff, the Covenant is broken, as *Proster and Newton's Case*. *Tr. 23 Car. 2. B. R. Rot. 856.* and *Judgment pro Quer'*, *3 Lev. 825. Buckley and Williams. Inv. M. 2 W. & M. C. B. Rot. 360.*

Covenant was, That the Lessee and his Assigns shall enjoy without the Interruption of F. E. and all others claiming under the said F. and the Breach assigned is, because he was ousted by J. S. who claimed under the Title of F. E. and shews not how he claims under his Interest, nor by what Conveyances: It's not good, and for that Reason reversed by all the Judges in the Exchequer Chamber. *Cra. Eliz. 823. White and Ever.*

That he was  
ousted by J. S.  
who claimed  
under the  
Title of, &c.  
and shews  
not how.

The Case is  
upon an Af-  
sumption.

The Defendant covenants to save the Plaintiff harmless, concerning the Possession of such an House; and Breach is, That such a one had evicted him, and the Defendant had not saved him harmless. *Verdict pro Quer'*. It was moved in Arrest, that it is not shewed that he was evicted by Title; and all Covenants extend only against legal Titles and Evictions. *Per Quer'*, this Agreement is only quoad the Possession, not quoad the Title, and Judgment *pro Quer'*, *2 Lev. 194. Gregory and Mar-  
jon, 3 Keeble 744.* De-

Declared on Demise of a Messuage, *simul cum*, one Garden, & Latrina [Angl. House of Office] *ad ulteriorem finem inde*, and covenant was, That he should enjoy *dimissa Præmissæ*; and assigns a Breach, That the Defendant had erected on Part of the Garden a Mansion-House, whereby the Plaintiff *usum Gardine præd secundum formam & effectum dimiss' præd babere non potuit*. Defendant pleaded, That *non obstante ædificat' præd*, the Plaintiff, *usum Gardini præd habere potuit, secundum veram Intention' dimissor' præd absq; hoc quod ædificatio præd aliquo modo impediret le Plaintiff, of the Use of the said Garden, secundum veram Intentionem Indentur' præd*.

Plaintiff demurs. *Per Cur'*, the Use of the Garden, is the Use of all the Garden, and not the Use only to pass to the House of Office, as was pretended by Defendant; and the Traverse contains more than is alledged in the Breach, *secundum veram Intentionem Indent' præd*, and the Court cannot know the true Intention of the Indenture, but by the Words of the Indenture. *3 Lev. 167. Kidder and West.*

Action of Covenant, for that the Defendant, *non indeminem conservavit ipsum de & concernente occupationem quorundem clausorum, &c.* *secundum formam* agreement, and sets forth no Title in the Disturber. *Cro. Eliz. 914. Cro. Jac. 355, 425. Vaughan 120, 121. 2 Sand. 78. 1 Mod. Rep. 66.* But this being after a Verdict, and the Plaintiff setting forth in his Declaration, That the Disturber recovered *per Judicium Curiæ*. Judgment was given *pro Quer'*. *2 Mod. 213. Major and Gregg.*

Traverse con-  
tains more  
than is al-  
leged in the  
Breach.

No Title set  
forth by the  
Disturber, yet  
good after a  
Verdict.

## The Law of Covenants.

Covenant is, That he shall suffer his Lessee for Years to enjoy the Land during the Term, and that without the Trouble of him or of any other Person; a Stranger enters by Eigne Title, the Covenant is not broken, because the Word [suffer] is a Passive, and all the Residue is to be referred to it. *Dier 255.a. Pl. 4.*

Bond with Condition, That the Plaintiff should have, hold and enjoy Land, acquitted from all Charge and Incumbrances; and for Breach, the Plaintiff sheweth, that there was a Rent-Charge granted by the Predecessor, under whom the Defendant claimed, which is yet undischarged. Defendant demurred. *Per Cur'*, if the Acquittal refer to the Land it self, or to the Person, the Defendant must shew how he hath discharged him from the very Rent. *1 Keb. 927.*

In Action of Covenant to perform Articles; which were, That the Plaintiff should hold and enjoy Lands free from all Titles and Incumbrances; and for Breach, the Plaintiff shewed, That *B.* died seised, and that his Wife had Title to Dower. Plaintiff demurs. *Cur'*, This Covenant goeth to the Land, and there can be no difference between a Covenant to discharge the Land of all Titles, and that the Defendant shall hold the Land so discharged. *1 Keb. 937. Andrews and Tanner.*

Where a Man  
must shew,  
that the En-  
try was by  
good Title or  
eigne Title,  
and where he  
need not.

A Man makes a Lease for Years, and covenants, That neither he himself, nor his Heirs or Executors, shall interrupt; and in Action of Covenant brought for the Entry of his Executors, the Plaintiff need not shew that the Executors entered upon any eigne or good Title, for it is all one, where the

**Shew how  
discharged.**

**To hold  
Lands free  
from all Ti-  
tles and In-  
cumbrances.**

the Action is brought against the Covenantor, or his Executors; *aliter* where a Stranger enters, for that the Plaintiff ought to shew that he entered upon *Eigne Title*, and upon good Title. 2 *Rol. Rep.* 21. *Force and Vines.*

<sup>1</sup> *Brownl.* 80. *Ratcliff's Case.*

In Covenant, the Plaintiff declared upon Articles of Agreement made between *Williams*, on the behalf of *T. M.* of the one Part, and *Rashly* of the other Part: It was agreed between the Parties, that the said *Rashly*, *quiete & pacifice haberet & occuparet tenementum vocatum S.* for one Year, except *dimissione prædicti cuidam Edw. Knowles, nuper tenantem Præmissum unum parvum clausum parcellum Præmissorum*, and that *Rashly* should pay 20*l.* by Quarterly Payments for the said Year; Plaintiff set forth he entered and put in his Cattle, and before the Year was out, *Knowles* sued *Rashly* in Trespass, and recovered Damage and Costs, which he was forced to pay, and so he did not hold the Premisses quietly.

*Per Cur'*, the Declaration is not good, for it Declaration is not set forth that *Knowles* had any Right, for the Articles amounted to a Lease; but if it had been a Collateral Covenant by a Stranger, it would be hard to extend it to a Tortious Entry. *Cro. Jac.* 42*s.* Where the Right.

Promise was to enjoy without the Interruption of any Person; and yet holds, that a Title ought to be set out. *Dier* 128. a. 1 *Rol. Abr.* 430. *contra.* This is no Covenant expressly against *Knowles*, for he is only mentioned in the Part excepted. 2 *Vent.* 59. *Rashly and Williams.*

A Covenant, that the Indenture of a Lease at the Time of the Assignment is a good, true, and indefeasible Lease, and that

[Indefeasible  
Lease.]

Covenant to  
enter into  
Bond for En-  
joyment of  
such Lands,  
and names no  
Sum.

Wherein a  
tortious Di-  
sturbance  
shall be a  
Breach of the  
Condition,  
and where  
not.

the Plaintiff shall enjoy, &c. without the Let or Interruption of the Defendant, or of any claiming by, from, or under him; and shews for Breach, that before he that made the Lease had any Thing, one *J. S.* was seized in Fee, and that he which made the Lease entered upon him and disseised, and leased *prout*, and that *J. S.* re-entered upon him; upon which Replication the Defendant demurs. *Per Cur'*, The Words, [indefeasible Lease] shall be construed as a distinct Sentence from the last Words, That he shall enjoy it without the Interruption of the Defendant. *Sid.* 328. *Gainsford* and *Griffith*. 1 *Sanders* 51. 2 *Keeble* 201.

*Note*, If I covenant with *B.* to enter into a Bond to him for Enjoyment of such Lands, and do not express what Sum, he shall be bound in such a Sum as amounteth to the Value of the Land. 5 *Rep.* 78. *a. Samon's Case*. Defendant's Case *supra*.

Action is brought against the Heir of *Edm. A.* the Condition was, Whereas the said *Edm. A.* such a Day, hath granted and given to the Plaintiff the Presentation to the Church of *D.* if therefore the said *Edm. A.* from Time to Time shall make good the said Grant from all Incumbrances made, or to be made, by him and his Heirs, that then, &c. The Grantor died, the Church became void, the Heir of the Grantor presented: This tortious Presentation is no Breach, but this extends only to lawful Disturbance by the Heir, for it appears by the Pleading, that the Heir had no Right to present, his Father having granted it before. *Per Hobart*, the Words shall be construed as if they had been, that he shall enjoy

enjoy the same from any Act or Acts made by him or his Heirs ; and in this Case, there ought to be a lawful Eviction to make a Breach of the Condition ; but otherwise, if the Condition had been, that he shall peaceably enjoy from any Act or Acts made by him or his Heirs, for in this Case a tortious Disturbance would have been a Breach of the Condition. *Winch. 25. Dr. Hant versus Allen.*

Covenant and assigns for Breach Non-payment of Rent ; Defendant pleads, a Bargain and Sale for Money for 100 Years before that Time of the same Land, made to *Allen*, and pleads the Statute of Uses, and then shews the Attainder of *Allen* for High Treason, and that by this Attainder it is vested in the King ; and pleads the Act of Attainder, and the Exceptions, and it was demurred to this Plea upon 4 Rep. 53. and Dier 256. because he had not pleaded, that *Allen*, or any under him, had not entered upon the Lands, and without Entry and Expulsion of the Defendant, he shall not be discharged of the Rent ; but it was said, it being upon the Statute of Uses, no Entry was requisite : But the greatest Doubt was, the Title is in the King, and the King is in Possession without Entry, and the Party is in Possession, *scil' the Defendant accountable to him for the Profits.* In Keeble, the Court agreed this a good Lease, by Way of *Estopel* ; and if the Rent be in being, the Covenant remains, & *è contra*, if not : And per Cur', this is a sufficient Eviction without Entry or Office alledged, nor need any Entry be laid by the first Lessee, he being said in Possession by virtue of the Statute ; and the King

## The Law of Covenants.

Not to be good as a Lease in Reversion, being not so pleaded but as a Grant of the present Estate.

Covenant not to molest.

What Molestation shall be intended.

is in actual Possession as much as if the Party had entered actually, though a common Person should not be said to be in Possession without Entry, by himself, or the first Lessee. Now this cannot be good as a Lease in Reversion, being not so pleaded, but as a Grant of the present Estate, but all agreed upon Assignment of the Lease there must be Attornment. The Plaintiff has declared on a Lease in Possession, as at Common Law, which is avoided by Eviction. Judgment *pro Defendant.* 1 Sid. p. 399. 2 Keb. 364, 444. *Banks and Smith.*

Covenant (in a Lease for Years of a Manor) That the Lessee shall not molest, vex or put out, any Copyholder, &c. Breach was, That the Defendant, *vi & armis*, entered upon a Copyhold, &c. in a Cow-House, Parcel of the Premisses, *& sic molestavit*, &c. This is not any Breach, for the Molestation is to be intended of such Sort, that he may oust him of his Copyhold, either by distreining, that he could not enjoy it quietly, or by some other Vexation, whereby he was forced to relinquish his Possession; and the Wrong is only here done to his Person, and not to his Copyhold Tenement, and so no Breach. *Cro. Eliz. 421. Penn and Glover.*

*C. Cornwallis* granted the next Avoidance, &c. to *March*: *March* assigned it to *Lewins*, to present to the same Church when it shall become void; and covenanted, That the same Person who shall be so presented by him shall enjoy it without the Let or Disturbance of the said *Cornwallis* or *March*, or any of them, or any by their Procurement. *Lewins* presents *J. S.* and after

ter *J. M.* presented another, claiming the first and next Avoidance by the Procurement of *Cornwallis*; and ruled, That the Declaration was not good, for it ought to say, That Declaration *Cornwallis* granted to *J. M.* the next Avoidance, and procured him to disturb, and that by his Procurement he was disturbed. *Winch. 4. bance by Procurement.*  
*Lewins and March.*

Lessor covenants with his Lessee, That he hath not done any Act to prejudice the Lease, but that the Lessee shall enjoy it against all Persons; these Words [against all Persons] shall refer to the first, and be limited to any Acts done by him. *Winch. p. 4.*

Defendant pleaded, he had a good Title at the Time of the Covenant, by virtue of certain Fines from Sir *P.* and his Wife, and that in 13 *Car. 2.* there was an Act of Parliament by which these Fines were declared void, and that Sir *P.* had Title; and entered, by reason of the Act: The Act which was pleaded recites, That certain Men came with Force and Arms, and extorted the Fines, Plaintiff demurred. *Per Cur'*, the Covenant is broken, though the Defendant cannot intend to covenant against an Act of Parliament, nor has the Defendant Cause to complain, because the Act was made because of his own Force and Fraud. *1 Vent. 175. Lucy and Levington. 2 Lev. 26. Mesme Case. Et 2 Keeble 831.*

*Baron and Feme* levied a Fine; *J. S.* covenants, That the Conifee shall enjoy it against all lawfully claiming from *B.* and *F.* brings Dower after the Death of *B.* the Conifee doth not plead the Fine, but suffers Judgment, and brings Covenant against *J. S.* and it was adjudged against him, for the Cov-

## The Law of Covenants.

nant shall not extend to a Right that is barred; and besides, she did not claim lawfully. *Ibid.* Cited per *Twisden*.

The Breach was assigned in not quiet Enjoyment: Defendant pleads, the Lease was made to him from *Michaelmas* 61, to *Michaelmas* 68. and that paying so much half Yearly, he should enjoy quietly; and shews he did not pay the last half Years Rent ending at *Michaelmas* 68. Defendant demurs, supposing the Words, [being to *Michaelmas* 68], there was not an entire half Year, the Day being to be excluded, and for that, *Vide 1 Cro. 702. Per Cur'*, it is true in Pleading, usq; *tale festum* will exclude that Day; but in Case of Reservation, the Construction is to be governed by the Intent. *1 Vent. 292. Pigot and Bridge.*

Covenant, That he shall have and enjoy. Breach, That *J. S.* brought Trespass and recovered; it was moved in Arrest of Judgment, because it doth appear that he that recovered had Title. Serjeant *Levins*, here is an express Covenant, That he shall enjoy, and he is disturbed in his Possession, though upon no Title. *Dier 328. a. Vaughan 120. Hob. 35. 2 Vent. 46.*

The Breach assigned was, That *B. babens jns Precedens*, to the Plaintiff's Conveyance, *Virtute Tituli* did enter, and good, though it had been plainer to have said, *Legale jus (contra, Yelv. 30.)* Had the Covenant been against the lawful Title of *J. S.* the Breach must have been so. *3 Keb. 41. Proctor and Newton.*

Lessor covenants, That the Lessee should peaceably and quietly enjoy the Land let during the Term; Plaintiff declares, That a Stranger entered upon him, and ousted him,

with-

within the Term. *Per Rolls*, the Covenant in this Case is broken, though he be a Stranger. *Stiles p. 67.*

Lessor covenants, That the Plaintiff and his Wife shall enjoy it during the Term, without the Interruption of him, or *f.* his Wife, and the Expulsion is laid of the Plaintiff only, yet it's good, because the Husband hath the sole Profits and Possession; and although the Entry of the Lessor is not alledged to be by Title, so as he is meerly a Tort Feasor, and though he might have Action of Trespass against him. *Cro. Jac. 383. Lady Platts Case.*

*A.* leased to *B.* certain Land for 40*l.* *per Annum*, and a Stranger covenanted with *A.* That *B.* should pay unto him the 40*l.* for the Farm, and Occupation of the said Land: *A.* brought Action of Covenant, Defendant pleaded, That before the Day of Payment the Plaintiff ousted *B.* of his Farm: It was moved, That it was no Plea, because this was a collateral Sum, and not for Rent issuing out of the Land; also, the Defendant is a Stranger to the Contract for the Farm. *Curia contra*, for the Defendant hath covenanted, That the Lessee shall pay for the said Farm and Occupation 40*l.* so it is as a Conditional Covenant; and here is, *Quid pro Quo*. And here the Consideration upon which the Covenant is conceived, (*scil'*) the Farm and the Occupation of it is taken away by the Act of the Plaintiff himself. *2 Leon. 115. Bedill's Case.*

In Action of Covenant a Breach was assigned by the Lessee, That he did not quietly enjoy it, &c. Lessor pleads in Bar, that the Covenant was, That the Lessee performing

## The Law of Covenants.

**Performing  
Covenants  
and paying  
the Rent.**

the Covenants, and paying his Rent, should quietly enjoy, &c. *Per Windham*, these Words, [Paying the Rent] is no Covenant Precedent, but rather Concomitant, and is liable to Construction as the subject Matter is; but here clearly it can be no Condition, being an usual Clause at the end of all Leases. *Per Cur'*, and yielding and paying makes no Condition, in *Babington* and *Allen's Case*. 2 Keb. 9. 23. Sid. Vide 1 Keb. 895. Cox and *Griffith*.

Covenant, for that the Testator sold to the Plaintiff 20 Tun of Copperace, and agreed with the Plaintiff, That if he failed of the Payment of such a Sum at such a Day, that he might quietly have and enjoy the said 20 Tun of Copperace; and alledged *in facto*, That the Money was not paid at the Day, & *quod non potuit habere & gaudere*, the said 20 Tun of Copperace. Action was brought, and Judgment was against the Defendant, by *nihil dicit*, and a Writ of Enquiry of Damages awarded, and 260*l.* Damages returned. *Per Cur'*, the Declaration is not good, in that he assigned not a sufficient Breach, *Quod non potuit habere & gaudere*, &c.

*Quod non potuit habere & gaudere*, without shewing how, and by whom he was disturbed, is not sufficient, for it ought to appear to the Court that it was a lawful Disturbance, otherwise there is not any Cause of Action; for the Goods being sold to him, if he were legally disturbed, he hath a sufficient Remedy, and is not to maintain an Action of Covenant; and of this Opinion was all the Court: And though Judgment was given against the Defendant by *nihil dicit*,

Judgment by yet *per Cur'*, he came time enough to alledge *nihil dicit*. this Matter, for until the last Judgment he

may

may well inform the Court of the Insufficiency of the Declaration ; and the Court seeing it insufficient, shall abate it. *Cro. Eliz. 914. Chantflower versus Prenstly Uxor, &c.*  
*Yel. 30. Mesme Case.*

Covenant, for that the Defendant *35 Eliz.* let to him the *Barton* of *B.* for 6 Years, and covenanted, That he should enjoy it during the Term quietly, and discharged from Tythes, &c. and further, That if the Tythes were demanded and recovered against him during the Term, that he should recoup in his Hands so much of the Rent as the Tythes amounted to : For Breach he sheweth, that in *42 Eliz.* the Person sued him for the Tythes of Corn growing there in the Years 38th and 39th of *Eliz.* whereupon it was demurred. *Per Cur'*, This Suit, after the Determination of the Term, was a Breach of Covenant, for he did not enjoy it discharged, &c. which is not intended of a real Discharge, for it appears not to be the Intent of the Parties, because it is agreed, that if he were sued he should recoup as much of the Rent in his Hands ; but their Meaning was, he should be freed from Suit and Payment of it ; and he is as greatly prejudiced by a Suit after the Term, as if he had been sued before the expiration of the Term : But because it was not alledged that the Suit was lawful, or that the Tythes were due, (for he was not bound to discharge him from illegal Suits) the Breach was not well assigned. *Cro. Eliz. 916, 917. Launing and Lovering.*

Suit on quiet  
Enjoyment,  
after the De-  
termination  
of a Term, a  
good Breach  
if well assign-  
ed.

## The Law of Covenants.

*Covenant to give Security upon Procurement of the Office to pay so much Yearly.*

The Defendant covenanted, Whereas the King had granted the Office of *Aulnegeor* to the Duke of *Lenox*, who had made the Plaintiffs his Deputies for 7 Years, of all Places except *Colchester*; that the Defendant covenanted with them, Whereas the said Duke had made a Deputation of that Office in *Colchester* for two Years, he would procure a Deputation to them for 7 Years, in the same Manner as *Everden* had it; Proviso, That they upon the making thereof should give Security for the Payment of 100*l. per Ann.* Rent for it, and Performance of Covenants; and they alledged, that they were always ready to give Security for the Rent, and the Defendant had not procured the Deputation. Defendant demurs: 1. Because they do not alledge Performance of the Promise, but only a Readiness to have given Security; *Sed non alloc'*, for they need not give Security till Deputation made, and the Non-performance of the Promise ought to come on the other Part. 2. Because it is not shewed that they required a Deputation to be made, and the Quality how the other was made, nor *in facto*, that there was any Deputation made to *Everden*; *Sed non alloc'*, for the Covenants mention that there was a Deputation, and he is estopped to say the contrary; and at his Peril he ought to procure such a one to the Plaintiffs as the other was, and that the Defendant ought to procure it immediately after the two Years expired, that the Plaintiffs might not lose the Profits thereof after they were due. 3. Because they shewed not the Breach according to the

*Security need  
not be given  
till Depu-  
tion made.*

the usual Form, *Et sic non tenuit conventionem in hoc, &c. Sed per Cur'*, there being a Breach thereof sufficiently alledged, they need not make a Repetition. *Cro. Jac. 297. Berwick versus Gibson, in Com' Scac'*.

The Conclusion, *Et sic non tenuit conventionem in hoc, &c. Sed per Cur'*, omitted.

Debt on Bond of 120*l.* for Performance of Covenants, by G. Butterfield *versus N. Marshal*.

Plea, That the Indenture was made such a Day, &c. *Per que Testatum existit*', That *W. M.* had given and granted to the Plaintiff one Messuage, &c. ac etiam *Libertat', ingress', egress', & regress'*, ad omnia tempora extunc ad praedicti G. B. (the Plaintiff) hered' & assign' suis ad pro & trans', &c. ac etiam in trans' & a longo atrio, &c. ad puteum [Anglice, the Well] ad-

*jungen' & sive existen' prox' ad domum, &c. ibid. baurire & petere aquam ibid. pro ejus & eorum ne-*

*cessar' & convenien' occasionibus & usibus ipso & ipsis solven' unam tertiam partem onerum quo de tempore in tempus contingent circa reparationem dicti putei & funium scularum, [Angl' Curbs] Haustrior' [Angl' Buckets] & Utensil ad inde pertin. Hab. in Fee, Covenant to warrant the Premisses.*

Covenant, That the Defendant, *ad tempus sigillationis & deliberationis ejusdem Indenture stetit & fuit seisis' de & in dicto Messuagio & Præmissis cum pertin' & qualibet parte inde de & in bono certo Legali absoluto & indefecibili statu hereditat' in feodo simplici in possessione absq; aliqua conditione vel limitatione aut al' materia vel re qua-*

*cunq; in al' Persona sive Personis quibus cunq; ad alterand', mutand', aut destruend' eundem. And also, that he the said William Marshal had full Power, &c. to grant, &c. Et quod ipse dict.*

*George Butterfield, hered' & assign' sui de tem-*

*poore in tempus & ad omnia tempora extunc legitime pacifice & quiete berent', tenerent & gauderent,*

*Messuag' & Præmissa præd' cum pertin' & quam-*

*libet*

libet pertin' inde absq; ill' legali impedimento molestatione aut interruptione quibuscunq; de ipso W.M. Hered' Executor' vel Assign' suis aut ull', al' Personæ sive Personis legit' clamari a per vel subter eum vel eos a quibus ipse clamabat ac etiam exonerat' acquietat' & liberat' de & ab omnibus & omni-modes prior' aut aliis Barganiis venditionibus, &c. ac de & ab omnibus aliis titulis molestis oneribus & incumbranciis quibuscunq; habit' fact' permis', Commiss', vel perpetrat' [Angl done] per ipsum W.M. Hered', Exec' & Administ' suos aut per ull' al', Personam vel Persona, quascunq; legitime clamari a per vel subter eum eos aut aliquem eorum. And the said W.M. further covenants for himself, &c. That he the said W.M. and Maria his Wife, & eorum Hered' ac omnes & singul' al' Persona & Personæ & eorum hered' tunc habentes, clamantes aut pretendentes, Here ull' Legale Titulum Statuum jus, &c. de tempore in tempus & ad omnia tempora extunc infra spatiū & annorum, &c. facerent, &c. Further Assurance, (viz.) tal' ulter' & alia legalia & remabilia actu' & acta rem & res devisamen' & devisamenta, assurancia, & conveyanciam in Lege, &c. foret per finem, fines, Feoffment, recuperation, &c.

Defendants plead general Performance. Quod bene & fideliter, performaver', observaver', pimplever', tenuer' & custodiver' omnia & singula Conventiones, Concessiones, &c. Ex ejus & eorum partibus & vicibus observand' performand', &c. Secundum formam & effectum Indenture illius & Conditionis præd. Et hoc paratus.

Repli'.

Perclud' non. Quia protestando quod præd' W.M. non performavit aliquod in Indentura prædict' content' ex parte sua per implend' in fact' idem Geo. dicit quod præd' Willielmus, ad præd' tempus siccillationis & deliberationis, Ind' præd' non fuit

*seitus de pluteo præd' in feod' simplic' secundum formam & effectum conventionis sua præd' in Indentura sua præd' superius content' prout præd' Nicholaum superius placitando allegavit. Et hoc petit quod, &c.*

One Exception was taken by the Defendant's Council to the Replication, for that the Plaintiff had assigned a Breach, That the Defendant, at the Time of the Sealing, &c. of the said Indenture, was not seized in Fee of the said Well, where there was not any Covenant in the Indenture, that he was seized in Fee: And of this Opinion was all the Court. But the Defendant ought to have alledged, That the Plaintiff had not any Power to grant the said Liberty to draw Water out of the Well.

Breach not well assigned.

An Exception was taken to the Plea, that it was not good, for in the Indenture there is a Covenant for quiet Enjoyment, without Interruption of any Person, &c. claiming under W.M. &c. ac etiam exonerat' acquietat', &c. de & ab omnibus incumbrancis, &c. and to such Covenant the Plea of Performance generally is not good: But the Defendant ought to have pleaded, That the Lands at the Time of the Conveyance were not incumbered in any Manner; but the Plea, as it is now, as much as if he had said, That he had discharged the Lands of all Incumbrances; which is ill, for he ought to have shewed how.

Covenant for quiet Enjoyment.

It was further objected to the Plea, that it was not good in Respect of the Covenant for further Assurance, for it is, that he shall make all further Assurance, either by Fine, Feoffment or Recovery, or all of them, or some

Covenant for  
further Af-  
furance.

some of them, or by other Means, as shall be by Plaintiff or Council advised or required : To this Covenant he ought to have pleaded, either that no Assurance was devised and required, or that such Assurance was devised and required, and no other, and that he had executed that which was devised and required ; and it is commonly pleaded in the Books, *Quod Concilium non dedit ad-  
visamentum*, which is a Proof that Performance generally is not a good Plea. These Excep-  
tions were proved by the Precedents. Coke  
Entr. 65. b. &c. 135. b. &c. 147. a. b. 244,  
245, & 635. a. b.

But the Court was of Opinion, That the Plea was good in Substance, though it was not the best sort of Pleading ; it was said, That the better sort of pleading Performance of Covenants for further Assurance was as is before objected, and to maintain the Plea Cases of Chapman. Cro. Car. 76. Brisco and King. Cro. Jac. 281. 2 Mod. 36. Lit. Pl. 193. But *per Cur'*, admitting the Bar was not good, yet for as much as it appears that the Plaintiff by his own shewing had no Cause of Action, he cannot have Judgment ; and he had Leave to discontinue. 1 Lut. But-  
terfield and Marshal.

## C H A P. XXII.

*Covenant to make Assurance.*

**I**F a Covenant be, to assure certain Lands To assure such Land to such Person as the Covenantee shall name, and after he assures this to the Covenantee himself; this is a good Performance of the Covenant, though it be not alledged that he named himself, for this Acceptance is a Nomination of himself. *M. 13 Jac. Housy and Wild.*

If Covenant be to make such Assurance to the Covenantee as the Covenantee shall advise, and after the Covenantee deviseth an Indenture, and tenders it to him, and he requires Time to shew it to his Council to advise with, which the other denies to him, yet if he seal it not presently, the Condition is broken. *2 Rep. 3. Manser's Case.*

If one covenant to surrender a Copyhold Estate to the Use of *A.* and his Heirs, it must be an effectual Surrender, and it's no compleat Surrender till it be presented in Court, and he ought to procure it to be so done: As if a Man covenant to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth this accordingly, this is a good Inception; yet if Livery be not made, it's a Breach. *Sbaun and Belly. Tr. 1651.*

## The Law of Covenants.

In Covenant on Articles, to pay upon St. Thomas's-Day, the Plaintiff making a good Estate, & *licet*, the Plaintiff had performed, though Defendant did not. Defendant pleads ready to Pay and Tender, and that the Plaintiff made no Assurance. The Plaintiff replied, That he sealed a Feoffment, and the Defendant neglected to take Seisin. Defendant demurs, because here is no sufficient Averment without Notice of the Character made, and when and how he will execute it ; for he, making a good Estate, is a Condition Precedent to the Payment, which the Court agreed ; and where a Precedent Condition is express'd, it must be averred in the Declaration, and a *Licet*, the Party had performed all on his Part is not sufficient : Judgment *pro* Defendant. *Large* and *Cheshire*. 2 Keb. 801. 1 Ventr. 147. *Mesme Case*.

*A*. covenants with *B*. to make such reasonable Assurance to *B*. in Fee of such Land, reserving to *A*. and his Heirs 20*l.* Rent *per Annum*, as Council shall advise, and after *B*. tenders to *A*. a Deed-Poll, by which *A*. shall enfeoff *B*. of Land in Fee, reserving the said Rent to *A*. in Fee : This is not any such reasonable Assurance to bind *A*. to seal it, for this is a Rent-Seck, and the Deed belongs to the Feoffee ; and then *A*. without the Deed cannot have any Remedy for the Rent. 1 Rol. Abr. 423. *Guppage* and *Ascue*, it ought to have been a Feoffment by Indenture rendering Rent.

The Condition or Covenant is to make an Estate of Inheritance to the Obligee or Covenantee, at such a Day and Place : The Defendant pleads, He was ready at the Day and Place to make it, &c. Plaintiff demurs.

*Per*

*What is not  
a reasonable  
Assurance.*

*Per Cur'*, the Plea is ill, he ought to give Notice of what Estate of Inheritance he would make him. *Stiles 61. Allen 24. Brook and him. Brook. 5 Rep. 22.*

If a Man covenants to make a Conveyance of certain Lands; if a Warranty or Covenant be put into the Deed, he is not bound to seal it. *1 Rol. Abr. 424. Raym. 190. 2 Cro. in. 571.*

Warranty or  
Covenants  
not to be put  
in.

The Condition or Covenant is to make such Assurance to the Obligee or Covenantee as the Obligee or Covenantee shall devise; and after the Covenantee deviseth an Indenture and tenders this to him, and he requires Time to shew it to his Council, he must seal it presently, for the Covenant is peremptory. *1 Anderson 122. Case 117. Andrews and Eddon. 1 Rol. Abr. 424. Wooton and Crook. 2 Rep. 3. Manser's Case.*

Time to ad-  
vise.

If a Man is bound to make good absolute perfect Assurance in Fee of Copyhold Lands, or others, it must not only be an absolute, but an effectual Conveyance. If a Man be bound to surrender a Copyhold to the Use of *A.* and his Heirs, on Consideration of Money, if he surrender into the Tenant's Hands, he must get it presented, for it must be an effectual Surrender. As if a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth so, this is a good Inception; yet, if Livery be not made, it is a Forfeiture of the Condition.

*1 Rol. Abr. 425. Shaw and Belby.*

One is bound to assure 20 Acres of Land, How Acres  
the Acres shall be accounted according to  
the Estimation of the Country where the  
Lands

Covenant to  
make a Feoff-  
ment, he must  
make Livery.

## The Law of Covenants.

Lands lie, and not according to the Measure limited in the Statute. *Cro. Eliz. 665. Some and Taylor.*

A Man by Deed indented, bargained and sold Lands to another in Fee, and covenanted by the same Deed, to make him a good and sufficient Estate in the said Lands before *Christmas* next, and afterwards before

*Where a Bar. gain and Sale not make a sufficient E-* *Christmas* the Bargainor acknowledged the Deed, and the same is enrolled. *Per Cur'*, by enrolled doth that Act the Covenant is not performed, for he ought to have levied a Fine, or made a Feoffment. *3 Leon. p. 1. Bendale, Numb. 15.*

*In Covenant to make Assurance, who to do the First Act.*

One covenants to make an Estate in Fee at the Costs of the Covenantee, the Covenantor is to do the First Act, (*viz.*) To let him know what Conveyance he will make: So *Twiford and Buckley's Case*, upon an Indenture of Covenants; wherein one of the Parties did covenant to make a Lease for the Life of the Covenantee, and for Two other Lives as he should name, and the Covenantor was

accept and signify under his Hand to be reasonable, or should pay to him before the 1<sup>st</sup> of *August* 350*l.* He surmiseth he was always ready to make the Assurance, and that the said *W.* had not signified what Assurance he would accept, nor required any. *Per Cur'*, He is not bound to devise any Assurance or Estate; but it is in his Election to accept an Estate tendered, or the Money, and there cannot be an Acceptance but where there is a Tender on the other Party, and therefore the other Party ought to have devised the Estate, and procured *W.* to accept thereof, otherwise he ought to pay the Money. *Cro. Eliz. 718. Mills and Wood.*

Covenantor covenanted with the Covenantee, That he, at the Costs of the Covenantee, would assure such Lands to him before such a Day; the Covenantor ought to do the First Act, (*viz.*) To give Notice what Assurance he will make, so as the other may know what Costs he is to tender; *aliter*, if he covenant to make some certain Assurance, as Fine, Feoffment, &c. *Cro. Eliz. 517. Holdings and Connard. Owen 157. Moo. 457. & 5 Rep. 22. Mesme Case;* and it's all one when the Covenant is general, and when it is par-

Notice where  
needful or  
not.

In Covenant on Articles, to pay upon St. Thomas's-Day, the Plaintiff making a good Estate, & *licet*, the Plaintiff had performed, though Defendant did not. Defendant pleads ready to Pay and Tender, and that the Plaintiff made no Assurance. The Plaintiff replied, That he sealed a Feoffment, and the Defendant neglected to take Seisin. Defendant demurs, because here is no sufficient Averment without Notice of the Character made, and when and how he will execute it ; for he, making a good Estate, is a Condition Precedent to the Payment, which the Court agreed ; and where a Precedent Condition is express'd, it must be averred in the Declaration, and a *Licet*, the Party had performed all on his Part is not sufficient : Judgment *pro* Defendant. *Large and Cheshire.*

*2 Keb. 801. 1 Ventr. 147. Mesme Case.*

*A.* covenants with *B.* to make such reasonable Assurance to *B.* in Fee of such Land, reserving to *A.* and his Heirs 20*l.* Rent per Annum, as Council shall advise, and after *B.* tenders to *A.* a Deed-Poll, by which *A.* shall enfeoff *B.* of Land in Fee, reserving the said Rent to *A.* in Fee : This is not any such reasonable Assurance to bind *A.* to seal it, for this is a Rent-Seck, and the Deed belongs to the Feoffee ; and then *A.* without the Deed cannot have any Remedy for the Rent. *1 Rol. Abr. 423. Guppage and Ascue,* it ought to have been a Feoffment by Indenture rendering Rent.

What is not  
a reasonable  
Assurance.

The Condition or Covenant is to make an Estate of Inheritance to the Obligee or Covenantee, at such a Day and Place : The Defendant pleads, He was ready at the Day and Place to make it, &c. Plaintiff demurs.

*Per*

*Per Cur'*, the Plea is ill, he ought to give Notice of what Estate of Inheritance he would make him. *Stiles* 61. *Allen* 24. *Brook* and *him*. *Brook*. 5 *Rep.* 22.

If a Man covenants to make a Conveyance of certain Lands; if a Warranty or Covenant be put into the Deed, he is not bound to seal it. 1 *Rol. Abr.* 424. *Raym.* 190. 2 *Cro.* in.

571.

The Condition or Covenant is to make such Assurance to the Obligee or Covenantee as the Obligee or Covenantee shall devise; and after the Covenantee deviseth an Indenture and tenders this to him, and he requires Time to shew it to his Council, he must seal it presently, for the Covenant is peremptory. 1 *Anderson* 122. *Case* 117. *Andrews* and *Eddon*. 1 *Rol. Abr.* 424. *Wooton* and *Crook*. 2 *Rep.* 3. *Manser's Case*.

Time to ad.  
vise.

If a Man is bound to make good absolute perfect Assurance in Fee of Copyhold Lands, or others, it must not only be an absolute, but an effectual Conveyance. If a Man be bound to surrender a Copyhold to the Use of *A.* and his Heirs, on Consideration of Money, if he surrender into the Tenant's Hands, he must get it presented, for it must be an effectual Surrender. As if a Man be bound to make a Feoffment to me upon Request, if I request him to make a Deed of Feoffment, with Letter of Attorney to *B.* to make Livery to me, and he doth so, this is a good Inception; yet, if Livery be not made, it is a Forfeiture of the Condition. 1 *Rol. Abr.* 425. *Shaw* and *Belby*.

Covenant to  
make a Feoff-  
ment, he must  
make Livery.

One is bound to assure 20 Acres of Land, How Acres  
the Acres shall be accounted according to shall be ac-  
the Estimation of the Country where the counted.

## The Law of Covenants.

Lands lie, and not according to the Measure limited in the Statute. *Cro. Eliz. 665. Some and Taylor.*

A Man by Deed indented, bargained and sold Lands to another in Fee, and covenanted by the same Deed, to make him a good and sufficient Estate in the said Lands before *Christmas* next, and afterwards before

**Where a Bar.** *Christmas* the Bargainor acknowledged the gain and Sale Deed, and the same is enrolled. *Per Cur'*, by that Act the Covenant is not performed, for he ought to have levied a Fine, or made a Feoffment. *3 Leon. p. 1. Bendle, Numb. 15.*

*In Covenant to make Assurance, who to do the First Act.*

One covenants to make an Estate in Fee at the Costs of the Covenantee, the Covenantor is to do the First Act, (*viz.*) To let him know what Conveyance he will make: So *Twiford and Buckley's Case*, upon an Indenture of Covenants; wherein one of the Parties did covenant to make a Lease for the Life of the Covenantee, and for Two other Lives as he should name, and the Covenantor was to give Possession. The Breach assigned was, That the Defendant had not made Livery and Seisin, and upon Performance pretended, the Plaintiff did demurr; and, upon great Debate, it was resolved that the Covenant was not broken, for that the Plaintiff had not done that which was first to be performed on his Part, (*viz.*) to name the Lives. *2 Mod. 75.*

**Covenant or Statute with Defeasance,** to make such good Assurance of an House to *W.* with such Covenants which he should

accept and signify under his Hand to be reasonable, or should pay to him before the 1st of August 350 l. He surmiseth he was always ready to make the Assurance, and that the said *W.* had not signified what Assurance he would accept, nor required any. *Per Cur'*, He is not bound to devise any Assurance or Estate; but it is in his Election to accept an Estate tendered, or the Money, and there cannot be an Acceptance but where there is a Tender on the other Party, and therefore the other Party ought to have devised the Estate, and procured *W.* to accept thereof, otherwise he ought to pay the Money. *Cro. Eliz. 718. Mills and Wood.*

Covenantor covenanted with the Covenantee, That he, at the Costs of the Covenantee, would assure such Lands to him before such a Day; the Covenantor ought to do the First Act, (*viz.*) To give Notice what Assurance he will make, so as the other may know what Costs he is to tender; *aliter*, if he covenant to make some certain Assurance, as Fine, Feoffment, &c. *Cro. Eliz. 517. Hallings and Connard. Owen 157. Moo. 457. & 5 Rep. 22. Mesme Case*; and it's all one when the Covenant is general, and when it is particular, as to make a Feoffment, the Covenantor ought to do the First Act there if he will have it by Parol or Indenture.

The Assurance ought to be drawn according to the Covenant; it was agreed 22 Jan. 28 Eliz. That the Defendant should make an Indenture of Bargain and Sale of all the Lands, which the Defendant then had in Yarmouth, and on 14 Sept. 29 Eliz. the Plaintiff tendered to the Defendant an Indenture of Bargain of all the said Lands, which he

Notice where  
needful or  
not.

Indenture of  
Bargain and  
Sale not war-  
ranted by th  
then Agreement.

## The Law of Covenants,

then had in Tarmouth, *Hab'* to him and his Heirs, *secundum Conclusionem & Agreeamentum præd'*, which the Defendant refused to seal. The Indenture of Bargain and Sale is not warranted by the Agreement, because it may be he had other Lands on the 14th of Sept. 39 Eliz. than he had at the Time of the Agreement, so need not to seal it, though in Truth he had not any more Lands: Tho' Popb. said, if he had more Lands he ought to have shewed it. *Cro. Eliz. 660. Keeble and Brown.*

**Assurance a-  
gree in Sub-  
stance with  
the Cove-  
nants, good.**

If the Assurance drawn agrees in Substance with the Covenants, though they vary in Words, it is not material; as if it were covenanted to assure all his Lands in D. and the Assurance is drawn by particular Names: It is good. *Ibid.*

When I am obliged, that J. S. who is a Stranger, shall levy a Fine to the Obligee, the Obligee is bound to sue forth a Writ of Covenant, for it's no Reason to compel the Obligor, who is a Stranger to the Estate that paſſeth by the Fine, to sue a Writ of Covenant; but if I am obliged to you, that J. S. shall levy a Fine to J. N. in such Case the Fine ought to be levied at my Peril, though J. N. will not sue a Writ of Covenant. *Winch. 29. Hill and Waldwin.*

If one do covenant generally to levy a Fine of Lands, he is not bound thereby to go before Commissioners by *Dedimus. Stiles, Pratt Reg. 75.*

*Debt*

Debt upon Articles. Chaloner *versus* Davis.

Debt for 100*l.* and declares, That by Articles of Agreement, i Maii, 8. W 3. between the Plaintiff and Defendant, *First*, It was agreed between the Parties aforesaid, and the Plaintiff covenanted that he, and all Persons claiming under him, should make to the Defendant a good and sufficient Title, Assurance, and Conveyance, of certain Lands, upon or before the 17th Nov. then next ensuing. *Secondly*, The Defendant covenants with the Plaintiff, that he or his Affigns, *tempore executionis & sigillationis talis* Conveyance, and in Consideration thereof would well and truly pay, or cause to be paid unto the Plaintiff, his Executors, Administrators, or Affigns, the full and just Sum of 503*l.* at the House of Sir Francis Child, situate, &c. and some other Articles, both bind themselves in 100*l.* for Performance. The Plaintiff avers, he had performed all the Covenants and Articles on his Part, and that the Defendant had not kept the Articles and Covenants on his Part ; and particularly the Plaintiff avers, that he and one Robert Markam, of, &c. *post confessionem* præd' scripti Articulorum præd' & ante præd' 17 Diem Nov' in eodem scripto Articulorum mentionat', scilicet 16 Die eiusdem Mensis Novemb' (eodem Roberto' Markham) possessionat' existent' de & in tenementis & præmissis præd' pro resid' duorum Terminorum Annorum reversions inde præfat' Willo' Chaloner (le Plaintiff,) & Hæredibus suis spectan' apud S. præd' quandam Indenturam suam Barganie & venditionis de Tenementis ac præmissis præd' in scripto Articulo & præd' mentionat' fecer' & sigillaver' & ut facta sua Inden-

tur' ill ad usum ipsius Thomæ Davis adtunc & ibid  
deliberavere pro quam quidem Indentur' præd  
Willielmus Chaloner & Robertus pro & in consi  
deratione separal' sum' 5 s. &c. eisdem W. C. &  
Robert' in manibus respective solut' (and so re  
cites the Lease for a Year,) and then recites  
the Release dated 17 Nov. sealed and delive  
red to the Use of the said Thomas Davis. The  
said Tho. Davis did grant, release and con  
firm (in Consideration of 503 l. bone, &c.  
in manibus mentionat' fore solut') and the said  
R. M. in Consideration of 5 s. and so recites  
the Release, &c. And the Plaintiff avers, that  
he was then and there ready, and offered  
semper que postea fuit & adbuc paritus existit ad  
custagia ipsius Thomæ (le Defendant) facer' &  
procurare fier' aliquam aliam conveyanciam de Te  
nementis & Premisis præd secundum formam Ar  
ticulorum prædict': And further avers, that the  
Defendant postea scilicet præd 17 Die Nov. apud  
S. præd de Premisis notitiam habuit. Et sic inde  
notitiam habens præd (le Defendant) Indent'  
ill se agreeare seu ill de eisdem W. Chaloner &  
Roberto ut fact' eorund' W. Chaloner & Robert'  
præd Thomæ acceptare adtunc & ibid penitus recu  
savit & adbuc recusat & præd summam 503 l.  
eisdem W. Chaloner secundum formam & effectum  
script' Articulor', præd præd Thomas seu Assignat' sui  
non solver' seu solvi causaver'. Sed ill eisdem Willo'  
Chaloner solvere secundum formam & effectum  
Articulorum præd, præd Thomas contradixit & ad  
buc contradicit per quod Actio accrevit eisdem Willo'  
Chaloner ad exigend' & habend' de præd Thomas  
præd 100 l. præd tamen Thomas licet sepius re  
quisit' &c. ad damnum 20 l. Et inde, &c.

Demurrer,

These

These Exceptions were taken to this Declaration.

1 Except. That the Execution of the Conveyance ought to precede the Payment of the Money ; and then if the Plaintiff hath no sufficiently shewed that he had executed such Conveyance, he hath not well entitled himself to the Action, and the Execution of the Conveyance ought to precede the Payment of the Money : And it was said by the Defendant's Council, that by the Articles no Day certain was appointed for the Payment of the Money, but this by the Agreement of the Parties was to be reduced to a Certainty by the Act of the Plaintiff, viz. the Execution of the Conveyance : By the Articles, the Conveyance was to be made upon or before the 17th of November then next ensuing ; and, as it seems, if the Plaintiff had executed a Conveyance before this Day, he might have had Action for the Money immediately after, by which it is proved the Duty accrues to the Plaintiff after the Execution of the Conveyance, and not before. If the Covenant had been to convey the Lands on a Day certain, then there had been some Colour that the Words, *tempore executionis & in consideratione inde, &c.* should refer to the said Day, and not to the Execution of the Conveyance ; and yet in such Case it hath been adjudged, that the Payment of the Money shall refer to the Act to be done, as was in the Case of Elwick and Cudworth, 1 Lut. 10 W. 3. B. R. where the Plaintiff covenants with the Defendant to transfer to the Defendant 400 l. in the Bank Stock, and the Defendant covenants that he would accept it, and

Where the Execution of the Conveyance ought to precede the Payment of the Money, or not.

## The Law of Covenants.

and that he, *tempore translationis inde*, would pay so much to the Plaintiff; and in Action on the Breach of this Covenant the Plaintiff declares, that he had given Notice to the Defendant, that he at such a Day and Place would transfer, &c. and appointed the Defendant to be there, &c. which he had refused, and the Breach was assigned in the Non-payment of the Money; but upon Demurrer, Judgment was given for the Defendant, for that it appears by the Plaintiff's own shewing that there was not any Transfer, and so no Money was due: The Opinion of the Court was, that the Execution of the Conveyance was to precede the Payment of the Money.

And as to the Point of pleading the Execution of the Conveyance, it was not well pleaded, for that upon the whole Matter there was a Surrender of the Interest of *Markham* to the Plaintiff, and by Consequence the Lease for an Year was only the Lease of the Plaintiff, and then the Plaintiff ought to have declared upon the Truth of his Case, according to the Operation of Law, upon all the Matter of Fact of the Case, which not being done, the Declaration for this is ill; and these Cases were cited to prove it, 2 Sand. 96. Chester and *Williams*, Noy. 66. Cook and *Brombill*, 1 Mod. 14. *Hall* and *Seabright*, 7 Rep. 24. b. *But's Case*, 2 Vent. 149. *Lade* and *Baker*, & 260, 266. And the Opinion of the Court, that for this the Declaration was ill; for it was said, Tenant for Years may not make a Lease within the Statute of Uses, and by this Means to give Possession to the Defendant, to make him capable of a Lease of the Reversion.

<sup>2</sup> Except. to the Declaration. That by the Articles

Articles the Plaintiff was to seal and execute to the Defendant and his Assigns a good and sufficient Assurance, &c, and the Declaration is, That he had sealed and delivered to the Use of the Defendant a Lease and Release, Averment of Performance. which is not a sufficient Averment of Performance of the Covenant in this Respect; for paradventure they were delivered to him who would not deliver them to the Defendant, and the Defendant had not any Means to compel the Delivery to him, because the Plaintiff has not mentioned any Person to whom he delivered them; and for this Exception these Cases were cited, *Noy.* 18. *Tanfield and Green*, 4 *Lev.* Case 48. *Bease and Drayton's Case*, 3 *Cr.* 143.

3 Except. That the Covenant of the Defendant was to pay 103 l. to the Plaintiff, or his Assigns, and the Declaration is only that he had not paid them to the Plaintiff, but doth not say, or his Assigns; and the Case of *Cole and Howes*, 3 *Cr.* 348. *Penson's Case*, 3 *Keb.* 440. *Abbot and Bishop's Case*, 2 *Sid.* 41. were cited.

4 Except. The Covenant is, that the Defendant should pay the Money upon the Execution of the Conveyance, at the House of Sir *Francis Child*, &c. And the Declaration is, That he has not paid *secundum formam & effectum Articulorum*, which is not good Pleading: For there being a Time and Place appointed for the Payment, it ought to be alledged, that the Money was not paid at such Time and Place. *Elborough and Yates*, 2 *Keb.* 874. was cited as to this Exception, *Vid.* 1 *Lev.* 145. 3 *Lev.* 293. 3 *Cr.* 281. 2 *Mod.* 268. *Lamplugh and Sheers*, 1 *Lut. Cro. Car.* 5. b. but no Resolution of the Court was upon these three last Exceptions. Judgment was given

*Payment secundum formam & effectum Articulorum.*

*pro Defendant.* For the first Point, see *Thorp and Thorp*, i *Lut. Chaloner and Davis*, 565.

**Thorp versus Thorp.** *Opinion of Court per C. J. Holt.*

Declaration upon mutual Promises upon an Agreement, by which the Plaintiff agreed to release the Equity of Redemption in Two Closes, in Consideration whereof the Defendant assumed to pay the Plaintiff 7*l.* &c.

In this Case the Agreement was, that the Plaintiff shall release the Equity of Redemption, in Consideration of which the Defendant is to pay 7*l.* so that the making the Release is a Condition Precedent to the Payment of the Money.

There needs no Averment where Covenant is for Covenant.

15 H. 7. 10. A good Difference upon the Words of the Agreement; One covenants to serve me for a Year, and I covenant to give him 20*l.* he may sue for the 20*l.* altho' he doth not serve me; otherwise, if the Agreement were, that he shall have 20*l.* to serve me for an Year.

There is no Reason that one shall be compelled to pay Money for Performance of an Act, before the Act be done. But here the Differences ensuing are to be noted:

i. If by the Agreement a Day certain shall be appointed for Payment of the Money, and this Day happens before the Act can be performed, there, tho' the Words are, That one shall pay so much for the Performance of such an Act by the other; yet the Party may have Action for the Money after the Day appointed for the Payment of the

the Money, and before the Act be done,  
*Vid. Ugbtred's Case, 7 Rep. 1 Ventr. 147. Larg and Cheshire's Case, 1 Sand. 319.* It was agreed, that *Pordage* should give to *Cole* 500*l.* for all his Land, the Money to be paid a Week after *Midsummer*: An Action lies for the Money before the Land is conveyed.

2. If a certain Day be appointed by the Agreement; yet if this Day happen after the Consideration is to be performed, there ought to be an Averment, that the Service is performed, *Dier 76.* If a Contract be made between Two, that for the Hawk of one to be delivered such a Day, the other shall have his Horse at *Christmas*; if the Hawk is not delivered at the Day, the other shall not have Action for the Horse; *Vid. 1 Rol. Abr. 415. al' contra.*

I agree, 2 *May*, make an Agreement, one to pay so much, and the other to deliver the Horse if they will; and upon such mutual Promises they may have mutual Action, but they may also make the Agreement otherwise, 2 *Mod. 33.*

Plaintiff declares, That in Consideration that he promised to assign his Interest in such an House, the Defendant promised to pay him so much: The Qu. was, Whether the Plaintiff ought to aver that he had assigned his Interest in the Houses. And it was ruled, he need not make such Averment upon the Authority of *Ugbtred's Case*. Judgment *pro Quer.*

*Covenant to make further Assurance on Request.*

**Within a Month after Request.**

Covenant to make further Assurance within one Month, upon Request of the Covenantee : If the Covenantee request him within the Month, and he refuseth, tho' he be ready after within the Month, yet the Covenant is broken, in as much as the Time of the Month is limited to the Request. *Aliter*, had it been within a Month after the Date of the Deed of Covenant, *H. 37 El. B. Per-point and Thimblethorp.*

**At all Times hereafter, within the Space of One Month, when he shall be required.**

**To make further Assurance within Seven Years.**

The Condition of an Obligation is such ; If the Obligor do at all Times hereafter, within the Space of one Month, when he shall be required, make such further Act and Acts, Assurance and Assurances, as the Obligee shall by his Council demand, &c. then the Bond to be void. In this Case, if the Obligee do not demand any further Assurance within the Month after the making of the Obligation, yet the Obligor is bound to make further Assurance within a Month after Request made, after the Month passed after the making the Bond, for that the first Words, [to wit, *At all Times hereafter*,] are without Limit, and the other Words [*Within one Month when he shall be required*] refer to the Request, (*videlicet*) he shall have a Month for doing it after Request, for the more favourable Construction shall be made to make the Agreement effectual ; and it is not like a common Covenant, to make further Assurance within Seven Years, for the Use in such Case has been to interpret it, that he shall not be troubled after Seven Years, *Hill. 1650. Wentworth and Wentworth, Intr. Trin. 1650.* Covenant

Covenant is to do any Thing upon Request. The Plaintiff assigns for Breach, The Defendant could not be found. After, he made Proclamation at the Church, and in several Market's giving Notice of the Request ; yet this is not any Request, in as much as it ought to be made to his Person, *Grimit and Pinnell, M. 8 Car B. R.*

Covenant in Condition of a Bond to convey Land, to make and suffer, &c. all and every such reasonable Act and Acts, Thing and Things, whatsoever they be, for the good and lawful assuring and sure making of the Mannor of S. to J. S. and his Heirs, &c. And the Breach assigned was, That he requested the Defendant, *quod ipse conveyaret & assuraret Manerium de S. to J. S. &c.* it's sufficiently assigned, for the Defendant ought to have done this upon Request by Feoffment, or some kind of Assurance, and if after the Plaintiff request a Fine, the Defendant ought to acknowledge it also, and so upon every several Request ; but he is not bound to give any Obligation or Recognisance, which is collateral Security, *Telv. 44, 45. Pudsey and Newsham, More 682. 1 Brownl. 84.* mesme Case.

Covenant to make farther Assurance ; If he make Assurance on Condition, it is not a Performance, *1 Rol. Abr. 425. Risbon and Gair.*

Debt on Bond of Covenants ; the Plaintiff sets forth an Indenture, which purports a Grant of Land by Two Men and their Wives, seised in Fee in Right of their Wives, Partners to the Plaintiff in Fee ; and it was covenanted, that the Plaintiffs and their Wives had good Right to assure the Land,

*Every several Request.*

*Not bound to give collateral Security.*

*Conditional Assurance.*

and

## The Law of Covenants.

and to make further Assurance upon Request at any Time within Seven Years ; and for Breach, that one of the Wives was within Age at the Time of the Assurance, and dies, and the Right of the Land descended to her Son, an Infant. The Defendant pleads, the Wife was of full Age, and it was found she was within Age : It was moved in Arrest of Judgment, Here is not any Request shewed to make the Assurance according to the Covenant, and so no Breach assigned. And tho' he had Time for Seven Years to make the Request, and the Wife dies within the Seven Years, and the Right descended to the Infant, and so impossible to make a good Assurance. *Per Cur'*, the Death of the Wife in the Infancy of the Son was an Act of God, and it was the Fault of the Plaintiff that he did not demand the Assurance in the Life of the Wife, and after her full Age ; for it appears by the Verdict, that in the 29 Car. 2. she was Twenty, and that 32 Car. 2. she had Issue, and so the Breach not well assigned. But another Breach was shewed, (*viz.*) That the Wife being within Age at the Time of the Covenant, as appears by the Verdict, she had not Power then to convey the Estate according to the Covenant, and this was a manifest Breach, Sir Tho. Jones, 195. *Nash and Aston.*

**The Plaintiff's Fault in not demanding Assurance.**

**To levy a Fine.**

One covenants for further Assurance to levy a Fine of all his Lands in D. which were Four Houses, and tenders a Fine. Defendant pleads, that at the Time of the Covenant he was only seised of Two Houses, and that the other Two descended to him afterwards, and good, for he is not bound to levy a Fine of more than he had at the Time of the Covenant,

tenant, for then more would pass, and is not like to the Case where more Acres are comprehended in the Fine, which will be to the Conisor : So covenant to levy a Fine of Two Acres, and the Fine is of Four Acres by the Name of Two Acres comprehended in the Indenture, it is not good, 1 *Rol. Rep.* 103, 117. *Wilson and Welch*, 2 *Bulst.* 317.

Covenant to make further Assurance, and to do any Act or Acts, &c. and shews that he demanded of him, and tendered a Note of a Fine, comprehending that he would levy a Fine of Three Messuages, &c. and that he required him to acknowledge it before a Judge of Assize. The Defendant pleads, That in the Note were more comprehended than he intended to assure ; it's no Plea : For the Residue is to the Use of the Conisor, and the Plaintiff need not shew that a Writ of Covenant was depending at the Time of the Request, tho' he must do that to make a good Fine, *Cr. Far.* 251. *Boulnes and Curtis*.

Covenant to make a Lease of so many Rooms upon Request, and the Covenantor prostrated Part ; the Plaintiff did not aver in his Count, that he requested the Defendant to make him a Lease, but it seems not to be necessary, the Defendant having disabled himself by the Prostration of the Buildings, 1 *Litt.* 308.

Q

Covenant

*Covenant to make Assurance as Council shall advise.*

Diverſity be-  
tween Assu-  
rance and rea-  
ſonable Assu-  
rance.

That he shall  
be bound in a  
Bond that the  
other shall en-  
joy : No Af-  
furance.

*Aliter,* if a  
Man be  
bound to do  
such Acts.

Obligation  
not any Af-  
furance.

As Council  
may advise.

If *A*, covenant to make such Assurance for the Payment of 100*l.* to *B.* as his Council shall devise, and his Council devise that *A.* shall make an Obligation of 1000*l.* for the Payment of 100*l.* he ought to perform it. *Aliter*, if the Covenant had been to make such reasonable Assurance.

A Man covenants to make such Assurance as the Council of the other shall devise ; and the Council adviseth that he shall be bound in a certain Obligation that the other shall occupy the Lands peaceably ; he is not bound to perform it, for this is not any Assurance within the Intent of the Covenant. *Per Cur'*, but if a Man be bound to do such Acts for the Assurance of the Mannor of *B.* as the Council of the other shall devise ; and the Council deviseth that he shall make an Obligation or Statute that the other shall enjoy it, he ought to perform it, otherwise he hath broken his Covenant.

If a Man covenant to make such Assurance as the Council of the Covenantee shall devise, of an Annuity of 30*l.* and of 200*l.* in Monies, and the Council deviseth that he shall make an Obligation, in which he shall oblige himself, his Heirs, and Executors, to pay to the other the Annuity, and also 200*l.* at certain Days ; he is not bound to perform it, for this Obligation is not any Assurance of the Annuity.

Covenant is to make to the Covenantee, or his Assigns, as good a Lease as Council may advise ; and after the Obligee comes to the Obligor,

Obligor, and appoints him to make a Lease to *J. S.* he ought to do it, altho' no Council adviseth it but the Obligee himself; for by the Words it is not necessary to have the Advice of Council, but only that the Lease be made so good as Council may advise, *Allen and Wedgwood.*

If the Condition or Covenant be to make such Assurance in Law of certain Lands to the Covenantee or Obligee, as by the Council of the Covenantee upon Request made shall be advised; and after *J. S.* was of Council of the Covenantee, and gives his Advice to the Covenantee, that the Covenantor shall make a certain Assurance; and the Covenantee gives Notice to the Covenantor of the said Advice, and requires him to perform it; he ought to perform it, for it is more convenient that the Council shall give the Advice to the Covenantee than to the Covenantor, for that the Covenantor doth not know whether he be of Council in this Matter, for he may be of Council in one Thing, and not in another, *3 Rep. Higgenbotham's Case.* In Covenant to make further Assurance; If the Council deviseth an Obligation or Statute for the peaceable Enjoyment, he is not bound to make it; but if the Covenant were to do such Act or Acts for the Assurance of *D.* as his Council shall devise, and he deviseth a Statute for the peaceable Enjoyment thereof, he is bound to make Assurance as the Plaintiff's Council shall devise: It is not sufficient to plead he made such Assurance, but that the Plaintiff's Council devised such Assurance which he had made, *Cr. El. 393. in Hutchinson's Case.*

*Council to whom to give the Advice.*

*3 Mod. 192.*

*How to plead.*

On Covenant, that before such a Day he would make sufficient Estate of Lands of such Value to the Plaintiff for Life ; the Defendant pleads he made an Estate in Lands of such a Value, &c. he must shew what Estate was advised, and what Land, that so there may be an Issue, 28 H. 8. 1. b.

One covenants to make further Assurance to the Bargainee, as his Council shall advise ; in this Case the Bargainee himself, altho' he be learned in the Law, may not devise this Assurance, but some one of his Council ought to devise it ; for if the Party himself may devise it, then it shall be no Plea to say, *quod Concilium non dedit advisamentum*, 5 Rep. 19. b. This Case was denied for Law by all the Judges, Pasche 13 Will. 3. Cam. B. Walker contra Gower.

*Concilium non dedit Advisa- mentum.*

By Advice of J. D. if J. D. advise an insufficient Security, it's a Discharge of the Covenant.

Covenant to make Assurance, and on the perfecting of it 300 l. to be paid Defendant pleads the Plaintiff had not any Right or Estate.

If one be bound to make to a Man a sure, sufficient, and lawful Estate in certain Lands, by Advice of J. D. if he make an Estate to him according to the Advice of J. D. be it sufficient or not, lawful or not lawful, yet he is excused of the Obligation, 5 Rep. 23. b. so said in Lamb's Case.

Articles of Agreement, whereby the Plaintiff covenanted to make an Assurance by a Day of Lands, as the Council of the Defendant shall advise, and on perfecting thereof the Defendant is to pay 300 l. and 300 l. at a Day after. The Defendant pleads, the Plaintiff had not at the Time of the Covenant, or after, any Right or Estate. Plaintiff demurs. Per Twisden, he may demur, for tho' the Plaintiff has no Estate, yet if he be required to convey, and doth not then do it by the Time, the Covenant is broken, for the Estate of the Covenantor may be in Trust.

Sed

*Sed Cur' contra.* This is good in Action by the Defendant for Non-assurance ; but here the Action is for the Money, and so the Defendant hath Election to plead as here, or that he rendered special Conveyance by Advice, and the Plaintiff refused ; and the manifest Intent of the Parties is not to pay any Money but upon Assurance, 1 Keb. 734, 756, *Audly and Berry.*

If *A.* covenant with *B.* to make such reasonable Assurance to *B.* in Fee of such Land, reserving to *A.* and his Heirs 20 s. Rent per Annum, as the Council of *B.* shall advise ; and after *B.* tenders to *A.* a Deed-Poll, by which *A.* enfeoff'd *B.* of the Land in Fee, reserving the said Rent to *A.* in Fee : This is not any such reasonable Assurance to bind *A.* to seal, for this is a Rent-seck, and the Deed belongs to the Feoffee, and then *A.* without the Deed shall not have any Remedy for the Rent, for he cannot prove the Feoffment, *Guppage and Ascue, Mich. 11 Car. B. R.*

Deed-Poll  
not any Assu-  
rance of  
Rent.

*A.* covenants with *B.* to make and do all such Acts and Devises for the better Assurance, which shall be devised by *B.* or his Council. *B.* deviseth a Release to be sealed by *A.* and *C.* his Son, and *A.* presently seals it, but *C.* not being letter'd, nor could read, prays *B.* to deliver it to him, that he might shew it to a Man learned in the Law, to inform him if it were according to the Covenant, and if it were according to the Covenant or Condition he would seal it; which to do *B.* refuseth, and *C.* refuseth to seal it : This is a Breach of the Covenant, for that he did not require the Writing to be read to him, and he was bound to take Conisance of the Law, whether it was according to the

Time to shew  
it, if it were  
according to  
the Covenant.

## The Law of Covenants.

Covenant, and he shall not have a reasonable Time to shew it to his Council, and the Covenant was Peremptory, to be performed at his Peril, *Dier* 338. *a. Wotton and Coke,*  
*2 Rep. 3. Manser's Case.*

So in *Simms and Smith's Case*, *1 Rol. Abr.* 441, 442. If *A.* being Copyholder for Life, covenants with *B.* to surrender to *B.* in Reversion the said Copyhold Tenement, *super rationabilem requisitionem ei fiend per B.* and after *B.* tender to *A.* a Writing, purporting a Letter of Attorney of Surrender of the said Tenement to *B.*, and *A.* requests that before they seal it, that she by her Council *circa scriptum illud infra rationabile tempus tunc proximum sequens Advisaretur*, which *B.* refuseth, and upon this *A.* refuseth to seal it: Admitting that *A.* was bound to seal the Letter of Attorney, and to surrender by such Letter of Attorney, then she had broken her Covenant, for she ought to take Conisance of the Law at her Peril, whether the Letter of Attorney be according to her Covenant, and shall not have any Time to be advised upon it; but the reasonable Time mentioned in the Covenant, intends reasonable Time in the doing it, (*viz.*) she shall have Time to read it before she seals it.

Reasonable  
Time.

Usual Cova-  
nents may be  
put in.

Covenant to make such Assurance as Council shall devise; they say, they tender'd a Lease and Release devised by Council, and sets it forth with the usual Covenants, and with a Warranty: Usual Covenants may be put in, but not a Warranty, *1 Mod. 67. Lassels and Catterton, Vid. 2 Keb. 685. Raym.*  
*190.*

A Cove-

A Covenant to make such Assurance for the Payment of 100*l.* to *B.* as his Council shall devise, and his Council deviseth that *A.* shall make an Obligation of 1000*l.* for the Payment of 100*l.* he ought to perform it, otherwise had it been to make such reasonable Assurance as the Council of the Covenantee shall devise, 1*Rol. Abr.* 423.

Covenant to make such Assurance as Council of, &c. shall devise, and the Defendant by Advice of Council demandeth a Release with Warranty. *Per Cur'*, this is not any Assurance, but a Means to recover in Value, 2*Leon.* 130. *Wye and Thoroughgood.*

A Release  
with War-  
ranty no Af-  
furance.

A Covenant to make such Estate to the Plaintiff as his Council shall advise, and faith *Concilium non dedit Advisamentum*: It was a *Concilium non dedit Advisa-*  
*mentum*. *Quere*, whether he ought not to say, *Concilium non dedit Advisa-*  
*mentum*, but now it's settled a good Plea, 11*H.* 7. 23. a. 6*H.* 7. 4. and need not alledge what Persons were of his Council, and that they gave no Advice, for the Plea is in the Negative; but if he plead his Council gave to him such Advice, he ought to plead what Persons were of his Council; then the Replication was, that *J. W.* was of the Plaintiff's Council, and no more, and he gave such Advice, &c. which Advisement the Plaintiff notified to the Defendant: Issue on the Advice, 6*H.* 7. 4.

One covenants to make such Assurance as the Plaintiff's Council shall advise, and he pleads Performance of Covenants, he cannot afterwards say, *Concilium non dedit Advisa-*  
*mentum*, in *Specot and Sheer's Case*, Cr. El. *dedit Advisa-*  
828. *mentum*.

## The Law of Covenants.

Notice.

If I am bound to make you such Assurance as *J. S.* shall devise, I am bound at my Peril to procure Notice; but if I am bounden to make such Assurance as your Council shall devise, there Notice ought to be given to me, *1 Leon. 105. Ras. 141.* in *Atkinson's Case.*

Request.

*W.* covenants for himself, his Heirs, Executors, Administrators and Assigns, within Seven Years, upon Request to convey to the Plaintiff a Copyhold Estate: *W.* dies, a Request must be made to his Executors. Tho' *W.* was seised in Fee, the Executors are bound to see it done; *2 Bulst. 158. Thurston's Case.*

Covenant to convey certain Lands in *B.* to the Plaintiff, by such Conveyance as the Plaintiff's Council should advise; and the Plaintiff by Advice of his Council did tender a Lease and Release *in hæc verba*, which Release contained several Covenants, amongst which one was against a Stranger, and a Warranty, and the Defendant refused to seal it. *Per Cur'*, there ought not to be a Covenant against a Stranger, nor Warranty, *Raym. 190. 1 Sid. 467. 1 Mod. 67. 2 Keeble 685. Laffels and Chalerton.*

Covenant to make an Assurance, and on perfecting thereof the Defendant is to pay *300 l.* Covenant is brought for the Money. Defendant pleads, the Plaintiff had no Estate which he could convey: The Plea is good, if no Assurance, nothing is to be paid, altho' the Plaintiff averred he was ready to perfect it, and that the Defendant never tendered any, nor hath paid; here the Action is for the Money, and the Defendant hath Election to plead as *hers*, or that he tendered a special

a special Conveyance by Advice, and the Plaintiff refused. Judgment *pro* Defendant, 1 *Keb.* 734, 756. *Audley and Berry.*

Covenant that if the Defendant would pay 40*l.* he would convey as the Council of the Plaintiff should advise. In Action of Covenant for the Money, Defendant pleads the Plaintiff did not convey as Council did advise, which *per Cur'* is ill, without particular shewing the Manner, and what the Council did advise, 1 *Keb.* 178. *Haines and Baily.*

In Action of Covenant, which was to make such an Assignment to the Plaintiff, according to an Agreement made between him and the Defendant as Council should advise. The Question was, If the Plaintiff or Defendant's Council shall give the Advice? It seems his Council shall advise to whom the Covenant is to be made, 1 *Bulst.* 160.

### *At whose Costs.*

That the Covenantor at the Costs of the Covenantee would assure such Lands before such a Day; the Covenantor is to make the Assurance what he pleaseth, and ought to give Notice what Assurance he will make, and his Readiness that the other may know what Costs he is to tender, Cr. El. 517. *Halling and Connard.* The Covenantor ought to do the first Act, (*viz.*)通知 to the Covenantee what Estate he will make, so that the Covenantee may know what Sum to tender; and it is all one, whether the Covenant is general or particular, as to make a Feoffment, &c. *Moo.* 457. & 5 *Rep.* 22. *b.* *mesme Case.*

If

**Assurance to  
be made by  
Parcels, if re-  
quired.**

If the Assurances are to be made at the Costs of him to whom they ought to be made, he may require the Assurance to be made by Parcels. *Aliter*, when the Covenantor is to be at the Charges: Yet there, if the Party require an Assurance of Parcel, the Covenantor must do it, but then he is discharged from making any Assurance of that which remains, *Crok. El. 681. Washington's Case.*

**Plea, That  
the Plaintiff  
did not ten-  
der the Costs.**

A Condition or Covenant to make a sufficient Lease to the Obligee or Covenantee before such a Day, the same to be made at the Costs of the Obligee: It is a good Plea, that the Plaintiff did not tender the Costs to him, and if then, that he was ready, *More N°. 72. Q. cest Liver.*

A Covenant that the Vendor shall make further Assurance at the Costs and Charges of the Purchaser; it was alledged for Breach, that a Note of a Fine was devised and ingrossed in Parchment, and delivered to the Vendor to acknowledge the Fine at the Assizes, which he refused to do. And the Plaintiff's Breach was demurred upon, because he did not offer Costs to the Vendor; and *per Cur'*, it's ill, *1 Brownl. 70. Preston and Dawson.*

*Pleadings.*

Pleadings. Vide supra Sparsum.

Condition of a Bond was, That if the Plaintiff shall seal to the Defendant a good and sufficient Conveyance in the Law of his Lands in *Jamaica*, with usual Covenants, as by the Defendant's Council shall be advised, then if the Defendant should thereupon pay, &c. after *Oyer* of the Condition. The Defendant pleads, that Mr. W. a Councillor at Law, did advise a Deed of Bargain and Sale from the Plaintiff to the Defendant, with the usual Covenants of all his Lands in *Jamaica*, and tendered the Conveyance to the Plaintiff, who refused to seal the same. Plaintiff demurs.

1. Because the Defendant hath not shewed the Conveyance, and an affirmative Plea ought to be particular: As to plead generally *Exoneravit*, is not good, but it must be shewed how, Cr. 2. 165, 359, 363. 1 Sid. 106. Cr. Car. 383. 2 Leon. 214.

2. The Matter of the Condition consists of Law and Fact, and both ought to be set out. The preparing of the Deed is Matter of Fact, and the Reasonableness and Validity thereof is Matter in Law, and the Court must judge of it.

3. The Plea is, That the Indenture had the usual Covenants, but doth not set them forth.

But *per Cur'* the Plea is good. For if the Defendant had set forth the whole Deed *Verbatim*, yet because the Lands are in *Jamaica*, Of Lands in and the Covenants are intended such as are usual there, the Court cannot judge of them, but they must be tried by the Jury. He hath set forth, the Conveyance was by Deed of Bargain

Bargain and Sale, which is well enough, and so if it had been by Grants, for Lands in *Jamaica* pass by Grant, and need no Livery and Seisin. If any Covenants were unreasonable and not usual, they are to be shewed on the other Side. Judgment *pro Defendant*, 2 Mod. 239, 240. *Goff and Elkin.*

If any Covenants be unreasonable, to be shewed on the other Side.

### C H A P. XXIII.

*Covenant to levy a Fine, or upon further Assurance.*

**I**F one do covenant generally to levy a Fine of Lands, he is not bound thereby to go before Commissioners by *Dedimus, Stiles Pract.* Reg. 75.

The Covenant was, That *J. S.* who is a Stranger, shall levy a Fine to the Covenantee, the Covenantee is bound to sue out a Writ of Covenant, *i. e.* to do the first Act. *Aliter*, if I covenant with you that *J. S.* shall levy a Fine to *J. N. Winch.* p. 39. *Hill and Waldron.*

**Who to sue out the Writ of Covenant.** Covenant is, That the Covenantor shall levy a Fine to the Covenantee, the Covenantee ought to do the first Act, *i. e.* to sue a Writ of Covenant, 5 Rep. 127. *a.* in *Palmer's Case*, *mesme li. 22. b.*

The Condition was, That *J. S.* shall levy a Fine to the Covenantee before such a Day. Defendant pleads, the Covenantee had not sued forth a Writ of Covenant. Plaintiff replies, that before the Covenant made *J. S.* had made a Feoffment to *J. D.* of the Land, and the Feoffee was in Possession at that Time.

Time. Here the Covenantee need not sue out a Writ of Covenant, for by the Feoffment J. S. had disabled himself. *Q. Winch. 30. Ell. Disability.* and *Waldron.*

One covenants for further Assurance to levy a Fine of all his Lands in D. which was Four Houses, and tenders a Fine. The Defendant pleads, at the Time of the Covenant he was only seised of Two Houses, and that the other Two descended to him afterwards, and good. A Covenant to levy a Fine of Two Acres, and the Fine is of Four Acres by the Name of Two Acres, comprehended in the Indenture, it is not good, *1 Rol. Rep. 103. Wilson and Welsh, 2 Bulst. 317.* *1 Rol. Abr. 425.*

A Covenant to make further Assurance, and to do any Act or Acts, &c. and shews he demanded of him, and tendered a Note of a Fine, comprehending that he would levy a Fine of Three Messuages, &c. and that he required him to acknowledge it before a Judge of Assize. The Defendant pleaded, in the Note there were more comprised than he intended to assure: It's no Plea, *Cr. Jac. 251. Boulney and Curtes.* If one be bound to levy a Fine to another, he is not bound to sue forth the Writ of Covenant, but he who is to have Advantage of the Fine is to do it. Who to sue And in the Case aforesaid, he ought to levy a Fine upon this Note, notwithstanding there was no Writ of Covenant then hanging; and in the said Case, tho' the Note contained more Acres than the Two-Yard Lands, it is good, *1 Bulst. 90. Vid. Cases.*

If one covenant generally to levy a Fine of certain Lands, the Covenantor is not bound to go before Commissioners authorized by a *Dedimus* to take the Fine to acknowledge his Consent, for it shall be intended he is to do it the ordinary Way, which is not before the Commissioners, *Tr. 22 Car. B. R.*

Also upon a Covenant to levy a Fine, the Party must bring his Writ of Covenant, *Et Precize & Concord*, and tender it to the Covenantor, before an Action of Covenant will lie for refusing to do it.

On a Covenant for farther Assurance, the Breach of Advice and Request by such a Council, and shews a *Dedimus potestatem* to A. and to receive the Conisance, and the Covenantor being requested, refuseth. Tho' he shew not any Writ of Covenant was depending, or that the Writ was delivered to the Commissioners, and tho' the Fine was with Warranty; yet because the Covenant is not to levy a Fine, but to do such Acts as shall be required, Judgment *pro Quer*, *Latch. p. 186. Tindal's Case.*

A Covenant that the Vendor shall make further Assurance at the Costs and Charges of the Purchaser; It was alledged for Breach, that a Note of a Fine was devised and ingrossed in Parchment, and delivered to the Vendor to acknowledge the Fine at the Assizes, which he refused to do. And the Plaintiff's Breach was demurred upon, because he did not offer Costs to the Vendor, and *per Cur' it's ill*, *1 Brownl. 70. Preston and Dawson.*

Levying a  
Fine for fur-  
ther Assu-  
rance.

Offered a  
Note of a  
Fine, but no  
Costs.

A Con-

A Condition to levy a Fine, not saying to whom, at the Costs of the Obligor ; the Defendant pleads no Fine was levied by the Wife of the Plaintiff according to the Condition. Plaintiff demurr'd, on *Rep. Palmer's Case*, and *Hull 48. Waldron and Hill*, because it is not averred that the Defendant brought any Writ of Covenant, *sed non Allocat'*. For *per Cur'*, the Law is now changed, and the Fine levied before any Writ entered, and therefore must be done by the Plaintiff without any Writ, *I Keb. 816. Culpeper and Austin.*

A Condition that such a Woman should make such farther reasonable Assurance to *J. D.* as *J. D.* should devise. *J. D.* levied a Fine, and required her to come before the Judge of Assize to acknowledge; she came, and the Judge refused her as *non compos mentis*. *Per Cur'*, the Condition was not broken, because it is to make a reasonable Assurance. *Aliter*, if the Words had been special to acknowledge a Fine, *I Leon. 304. Ret. and Callis.*

Condition that he and his Wife would levy a Fine upon reasonable Request of the Obligee; he made the Request, the Wife being very sick, so as she could not travel; resolved her Sickness saved the Obligation from Forfeiture, *More N°. 256.*

A Covenant that Baron and Feme being Lessees for Life should levy a Fine to a Stranger, at the Costs of the Stranger; and also that they should levy a Fine of other Lands to a Stranger at their Charge. The Covernantor saith, the Baron and Feme did offer to levy the Fine if the Stanger would bear the Charges. Plaintiff demurs, and Judgment *pro Quer'*, because the levying of the

Fine to be  
levied with-  
out any Writ  
of Covenant.

Diversity to  
make rea-  
sonable Assu-  
rance, and a  
special Cove-  
nant to ac-  
knowledge a  
Fine.

## The Law of Covenants.

[And also.]

the second Fine had no Reference to the other, for [and also] makes them Two Distinct Sentences.

### Pleadings.

Bond for Performance of Covenants ; one was to marry S. the Daughter : Another, That Sir E. S. and his Wife should levy a Fine of such Lands to the Defendant, and to the Plaintiff's Daughter S. and to the Heirs of their Bodies. 3. That the Inheritance of the Premisses should remain in the said Sir E. S. or himself until the Fine levied. 4. Whereas he had granted a Lease for Years to S. the Plaintiff's Daughter, that he had not made any former Grant, nor would make any Grant thereof without the Plaintiff's Assent. The Defendant *quoad* the last Covenant in the Negative pleads, That he had not made any former Grant of the Lease, nor had made any Grant after the Obligation, without the Plaintiff's Assent. *Et quoad omnes alias conventiones*, that he had performed them. Plaintiff demurs.

**The Performance of Acts on Reward ought to be shewed specially.**

1. Because the Covenant to levy a Fine is an Act to be performed by a Stranger, and it is an Act to be performed on Record, in both which Cases he ought to plead how he had performed it ; and it is not sufficient to plead general Performance, for Acts of Record ought to be shewed specially, and the Answer to them is only *null tell* Record, and no other Issue can be taken.

**In disjunctive Covenants he ought to shew which of them performed.**

2. Because the Covenant being in the Disjunctive, he ought to shew specially which of them, and not generally.

3. He

3. He pleads he did not grant without the Plaintiff's Assent, which is a Negative Preg-  
nant, and so not good, and all allowed *per Pregnant:*  
*Curiam, Cr. Fac. 559. Lee and Lutbrel, 2 Rol.*  
*Rep. 159: mesme Cale.*

## C H A P. XXIV.

*Covenant to account.*

**A** Condition recited; The Defendant ser-  
ved the Plaintiff as Clerk to a Brewer;  
and that if he performed such Covenants, &c.  
The Defendant pleaded, *performavit omnia.*  
Plaintiff replies, one Covenant was to give  
the Plaintiff a true Account of all such Mo-  
nies as the Defendant should receive when  
requested, and alledgedeth that 30*l.* came to  
his Hands, and he requested, and he refused.  
The Defendant rejoins, and confesseth the **Defendant**  
Receipt; but saith, that before the Request **pleads he was**  
made by the Plaintiff he laid it up in the **robbed, and**  
Plaintiff's Warehouse, and that certain Ma-  
lefactors (to the Defendant unknown) stole  
it away, *Et hoc paratus,* &c: Plaintiff de-  
murs generally.

1. Because it's a Departure.
2. He ought to have concluded to the Country. Plaintiff alledgedeth, the Defendant received 30*l.* and gave no Account. Defendant in his Rejoinder sets forth he did give Account, and there was an Issue, both were over-ruled.

1. It is no Departure, but a Fortification of the Bar; for shewing that he was robbed, is giving an Account.

2. The Conclusion is proper, because the Defendant alledged new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Rejoinder; he doth not say he gave an Account, but setteth forth the special Matter how, *1 Ventr. 121. Vere and Smith, 2 Lev. 5. mesme Case.*

One possess'd of a Term of Six Years of a Tavern, leased the same to another for Three Years; and it was covenanted between them, that during the Three Years, *quolibet Mense*, monthly the Lessee should give an Account to the Lessor of the Wine that he sold, and should pay to him so much for every Tun sold. Lessor grants the Three Years which were remaining of the Six Years to another, and he requested the Lessee to Account, and he would not, and so brought Covenant. Defendant pleaded he had accounted to the Assignee of the Three Years. Plaintiff demurs. It's no Plea, because it is not a Covenant which did go with the Land, or the Reversion, but was a collateral Thing, and did not pass by the Assignment of the Three Years, *Godb. 120. More 243. Vide this Case infra*, reported more full in *Crok. El. Gallies and Budbury.*

Covenant  
collateral.

Debt by a Brewer, on a Bond to perform Articles against his Clerk: One was, That the Defendant should deliver such Ale and Beer weekly as should be delivered unto him to such Customers as he had in his Charge, and to receive the Monies due for the same, and should accompt with the Plaintiff every Saturday weekly for such Money he should receive: For Breach, the Plaintiff assigns, That the Defendant did not account with him for such Monies as he had received on

Saturday the 25th, &c. Verdict *pro Quer'*.

Judgment was arrested: For the Breach was A Breach un-  
uncertainly al-  
leged, because the Plaintiff certainly al-  
doth not shew the Defendant had any Custo-  
mers in his Charge, or who they were, or  
that he had delivered Ale or Beer to them,  
or received any Money of them, *Stiles p. 473,*  
& 476. *Arnold and Lloyd.*

Covenant and declares to pay so much out  
of the Profits of an Office, which shall be  
clear beyond such a Sum: The Declaration  
shews not the Place of Account, nor the  
Sum clear. It's ill, *Sid. 304. Bucknal's Case,*  
*2 Keeble 92. mesme Case.*

The Place of  
Account not  
shewed.

Covenant in Writing sealed, by which the  
Defendant-Testator acknowledged himself  
to be accountable to the Plaintiff for all such  
Money that shall be charged by him upon *A.*  
to be paid to *B.* and saith he charged so much  
upon *A.* to be paid to *B.* and that he had not  
paid it, for which he brought this Action  
against his Executors; Covenant well lies,  
tho', *Cr. Car. 128. Garry and Reason's Case*  
was cited to the contrary, and so it will lie  
upon Words in a Deed purporting an Agree-  
ment for Payment of Money. It was moved  
there is not any Notice given what the  
Money was, and that this was not paid  
over; but *per Cur'*, he having taken it upon  
him, and the Person being certain, so that  
he might inform himself, and the the Agree-  
ment not being to pay ~~it~~ upon Notice, the  
Defendant is bound to take Notice himself:  
And Judgment *pro Quer'*, *1 Lev. 47. Brice*  
*versus Car & al.*

No Notice of  
a Thing to  
be done by a  
Person cer-  
tain, who  
had taken up-  
on him to do  
it.

Upon a Special Agreement that the Plain-  
tiff shall enjoy and receive the Profits and  
Salary of an Office during Life; upon Co-  
venant

That the  
Plaintiff shall  
receive the  
Salary.

tenant brought, the Defendant pleaded, That he suffered the Plaintiff to enjoy and receive the Profits, &c. And *per Cur.*, its good, for it's not a personal Warranty or Engagement to pay the Salary. The Defendant is not bound by this Agreement to pay the Money, but only restrained from intermeddling with the Profits and Salary, 4 Mod. 43. Sawyer and Killigrew.

The Plaintiff being possess'd of a Term for Six Years of a Tavern in Gracechurch-street, let the same by Indenture, with Plate and divers Utensils in the House, to the Defendant for Three Years. The Defendant in Consideration thereof covenanted with him and his Assigns, That *de mense in mensem mensarim*, he would upon Request render to him and his Assigns, an Account for every Tun of Wine he did sell there, and pay him for every Tun sold 30 s. And there were divers other Covenants on his Part, (some in the Affirmative, and some in the Negative;) he pleaded Covenants performed (which was ill in that). The Plaintiff replieth, That upon the last Day of July he required the Defendant to give him an Account of a Tun of Wine sold at such a Time, which he refused to do. The Defendant rejoined, That before that Time the Plaintiff being possess'd of a Term in the Tavern for divers Years, Part whereof were yet to come, (but shews not what Time in certain, nor the Commencement of it, and therefore it was agreed by all it was ill in that;) granted the Residue of the said Term then to come to B. to which Grant he attorned, after which Time he did not refuse. Plaintiff demurs. This is a Rent reserved, and in nature and lieu of the Rent,

bur

but the Request of an Account was to be To account within the Month ; and this Request, as appears by Computation, was the Day after the Month which the Secondary certified, and for that Cause Judgment against the Plaintiff, Cr. El. 62. *Gallies and Budbury.*

The Covenantor, who was Bailiff of a Manor of the Covenantee, covenants to render a just Account before such a Day of all the Rents of the Mannor which he hath received ; he pleads to Action against him, that before the said Day he had made an Account of all the Rents which he had received, and because he did not shew what Sums he received, the Plea was ill, *Sanders and Maleverer's Case cited, Cr. El. 749.* in *Mint's and Bethil's Case.*

Bond to pay 40 l. when an Account shall be stated : The Case was, Debt on Bond, wherein the Testator did acknowledge himself to be indebted in 40 l. to the Plaintiff, which he did covenant to pay when such a Bill of Costs should be settled by Two Attorneys, indifferently to be chosen. *Per Cur'*, it is not a *Solvend'*, but a *Covenant*, Not a *s.l.-vend'*, but a *Covenant*. which did not take away the Duty ascertained by the Obligation ; and if it should not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor, whether ever it should be payable. And the Plaintiff having named an Attorney, ought to recover, 2 Mod. 266. *Sir J. Ottway versus Holdins.*

In Action of Covenant the Plaintiff declared, that where it was covenanted between the Plaintiff and Defendant, that each of them upon Request should be accountable to the other for all the Corn growing upon

R 3 such

such a Place, and that upon such Account the one of them should deliver to the other the Moiety of the Corn, or the Profit of it. And whereas the Defendant had taken all the said Corn, (*scilicet*) Twenty Loads of Wheat, &c. growing upon the said Land, and had been required to render Account of the said Corn, which he refused to do: The Defendant traversed the Request, and it was demurred to. It was moved, that the Traverse was not good; but the Defendant ought to say, that the Plaintiff did not require him, *modo & forma*, but the Exception was not allowed; but *per Cur'*, the Traverse was held good, 2 Leon. 5. Nevill and Cook.

To give Account of all such Monies as should come to his Hands.

Debt on Bond or Covenant, to give an Account of all such Monies which should come to his Hands, and to pay them to the Plaintiff. Defendant pleads, no Monies came to his Hands. Plaintiff replies, such a Sum came to his Hands. Defendant demurs. *Per Cur'*, the Replication is ill, in not mentioning that he refused to come to Account, and that Breach ought to be assigned, 1 Lev. 226. Hegeman and Gerrard, 1 Sid. 340. 1 Sand. 102. mesme Case.

In Action of Covenant to account for Money received during the Lunacy of Sir B. Wray; The Plaintiff sheweth there was 800 £ received, and saith not during the Lunacy, which *per Cur'*, is ill, *præter Windham*, who conceived this ought to be shewed by the Defendant in discharge. It's said, the Defendant had laid out the 800 £. in Reparations of Fences, and doth not shew he had accounted, which *per Cur'*, he ought to do. And it's no Plea to say the Plaintiff did not assign Auditors, as it is in Account against a Bayliff.

Pleaded he had laid out 800 £. in Reparations, and saith not he had accounted.

Bayliff. Judgment pro Quer', as to this Breach upon the Want of Account, 2 Keb. 145. Barker versus Thorrald, 2 Sand. 47. mesme Case.

A. and B. are Executors of C. A. alone covenants with N. that if N. marry the Daughter of C. it should be lawful for N. to view and search all such Accounts as concerned the Estate of C. payable to that Daughter. N. marries her, and after N. requested A. and also B. the other Executor, who had those Accounts to view the same: B. refuseth to shew them; by this A. hath broken his Covenant, for thereby in Law A. undertook that any Person that had such Accounts should suffer N. to view and search them,

1 Rol. Abr. 431.

## R 4 C H A P.

## C H A P. XXV.

*Covenant that the Land shall be of such a Value.*

**I**F a Man let Lands for Years, and covenants with the Lessee, That he shall enjoy it without any lawful Interruption by the Lessor, or any claiming under him; and also covenants, That the Land shall remain and continue to the Lessee and his Assigns, of the clear Yearly Value of 20*l.* over all Reprises during the Term, and after the Lessor enters upon the Lessee and ousts him tortiously, and takes the Profits for divers Years, so that this doth not continue to the Lessee of any Value, for the Lessor took the Profits: He had broken his Covenant, for the Lessee may have Action for the Interruption on the other Covenant; yet by Special Words he had covenanted, That the Land shall continue to the Lessee of such a Value, and it shall not be intended that the Covenant was made to the Intent to warrant it to be of this Yearly Value generally, and not to the Lessee, when it is expressly covenanted that it shall continue to the Lessee of this Value. *I Rol. Abr. 429. Cave and Brocksby.*

**E**ntry, and taking the Profits, a Breach of this Covenant.

**N**otwith-standing any Act, &c.

R. covenants, That the Lands conveyed to the Wife for her Jointure, are of the Yearly Value of 100*l.* and so shall continue, notwithstanding any Act done, or to be done, by him; Action is brought, for that the Land was not of the Yearly Value of 100*l.* Adjudged against the Plaintiff, for these Words [notwithstanding any Act] extends

tends, as well to the Time of the Covenant made, as to the Time future; and though they were not then of that Value, the Covenant was not then broken, except some Act done by him were the Cause of it. *Cro. Eliz. 43. Lady Rich's Case. 1 Anderson 134. id. Casus.*

One covenant, That he was seised of the Mannor at the Date of the said Indenture, of a lawful Estate in Fee, notwithstanding any Act done by him or any of his Ancestors, and that no Reversion or Remainder was then in the King, or any other; and that the said Mannor was then of the Yearly Value of 300*l.* and that the Plaintiff and his Heirs shall enjoy it, according to the Limitations discharged of all Incumbrances made by him, or any of his Ancestors. *Per Cur.* The Covenant for the Yearly Value is an absolute and distinct Covenant of it self, and hath no Dependance on the first Part of the Covenant, That notwithstanding any Act, &c. *Cro. Car. 107. Sir William Crayford's Case. Lit. Rep. 80. id. Casus. Vide 3 Lev. 46. 1 Sand. 59, 60.*

The Covenant for the Yearly Value  
an absolute  
and distinct  
Covenant.

Covenant to assure the Mannor of *D.* being of the Value of 100*l. per Annum*; adjudged, That if he fail in the Matter, or in the Value, it is a Breach, as well as if it had been in several Covenants. *Lit. Rep. 204.*

*A.* lets Land to *B.* rendering Rent, *B.* covenants to bear all Charges and Taxes whatsoever, and to discharge *A.* of them; after which an Ordinance of Parliament is made, That the Lessees shall deduct their Taxes for the Monthly Assessment out of the Lessor's Rents; decreed in *Chancery*, that *B.* in the said Case shall make Deduction out of the Rent.

In

## C.H.A.P. XXV.

*Covenant that the Land shall be of such a Value.*

**I**F a Man let Lands for Years, and covenants with the Lessee, That he shall enjoy it without any lawful Interruption by the Lessor, or any claiming under him ; and also covenants, That the Land shall remain and continue to the Lessee and his Assigns, of the clear Yearly Value of 20*l.* over all Reprises during the Term, and after the Lessor enters upon the Lessee and ousts him tortiously, and takes the Profits for divers Years, so that this doth not continue to the Lessee of any Value, for the Lessor took the Profits : He had broken his Covenant, for the Lessee may have Action for the Interruption on the other Covenant ; yet by Special Words he had covenanted, That the Land shall continue to the Lessee of such a Value, and it shall not be intended that the Covenant was made to the Intent to warrant it to be of this Yearly Value generally, and not to the Lessee, when it is expressly covenanted that it shall continue to the Lessee of this Value. *1 Rol. Abr. 429. Cave and Brocksby.*

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One covenants, That he was seised of the Mannor at the Date of the said Indenture, of a lawful Estate in Fee, notwithstanding any Act done by him or any of his Ancestors, and that no Reversion or Remainder was then in the King, or any other; and that the said Mannor was then of the Yearly Value of 300*l.* and that the Plaintiff and his Heirs shall enjoy it, according to the Limitations discharged of all Incumbrances made by him, or any of his Ancestors. *Per Cur.* The Covenant for the Yearly Value is an absolute and distinct Covenant of it self, and hath no Dependance on the first Part of the Covenant, That notwithstanding any Act, &c. *Cro. Car. 107. Sir William Crayford's Case. Lit. Rep. 80. id. Casus. Vide 3 Lev. 46. 1 Sand. 59, 60.*

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In

## The Law of Covenants.

In Cancell, 19 June. Tr. 24 Car. I. in Wright; and Dixwell's Case.

In 15 Eliz. B. C. a Case was moved to the Justices by Serjeant Lovelace. A Man covenanted with another to make and execute an Estate of such Lands as should descend to him from his Father and Grandfather by a certain Day, the same Lands to be of the clear Yearly Value of 40 Marks: The Question was, If the Party had more Lands which came to him from his Grandfather and Father than did amount to the Yearly Value of 40 Marks? If he was to make Assurance of all the Lands, or of so much thereof only as amounted to the Value of 40 Marks? Per Manwood, C. J. he shall make of Lands only which were of the Value of 40 Marks per Annum, for the Words [such which] do not go so largely as if he had said, All my Lands which shall descend, or come to be descended; for then the Yearly Value were but a Demonstration, and all his Lands ought to be assured. 3 Leon. 27.

### Covenant to pay Taxes.

#### On Bishops Lease.

Plaintiff declares, That the Defendant's Predecessor, Bishop of Salisbury, being seized in Fee, let to the Plaintiff certain Lands for 21 Years, reserving the ancient Rent, and covenanted for him and his Successors to discharge all Publick Taxes upon the Land; and that the Defendant since was made Bishop, and a Tax was ass'd by Parliament, and he refused to pay it.

Q. Whether this is such a Covenant as shall bind the Successor as incident to a Lease, which the Bishop is empowered to make

make by the Statute of 32 H. 8. If it should now be taken, that every Covenant should bind the Successor, the Stat. 1 Eliz. should be of none Effect. By *Hale*, admitting this was an ancient Covenant, (and so it should have been averred to have been used in former Leases) to discharge ordinary Payments, as Pensions or Tenthys granted by the Clergy, then it might bind the Successor, by 32 H. 8. but it were very hard to extend it to new Charges: However, this Covenant should prove it would not avoid the Lease, but the Declaration being insufficient, they did not resolve it fully; for he saith the Predecessor was seized, but saith not *in jure Episcopatus*, for he might be seized in his natural Capacity. 1 *Vent.* 223. *Demandant versus Bishop of Salisbury.* 2 *Lev.* 68. *Mesme Case.*

Lessee covenanted with the Lessor to pay all Charges, Dues and Duties to be paid, for or by Reason of the Land, and to discharge the Lessor of them; after this, in 18 Cor. 1. the Act of Parliament for the 400000 l. is made; which saith, That the Lessors shall be charged for their Rent to the said Tax. If this Act of Parliament discharged the Covenant? was proposed to Mr. *Hales*, and Serjeant *Rolls*, to have their Opinions under their Hands, which they did in this manner: Mr. *Hales* wrote, No; 1. Because the Act did not intend to discharge this Covenant, for if it had intended so, then it would have said, That all Covenants shall be void, as in the Stat. 39 Eliz. cap. 2. of converting Arable Land into Pasture, and Stat. 14 Eliz. cap. 11. of Leases, expresses Clauses to make all Covenants void, which shews that otherwise they

## The Law of Covenants.

they shall not be taken away. 2. This Covenant is a collateral Thing. 3. It was a Fault in the Lessee to make such a Covenant, he might have made a Covenant to discharge all ordinary Charges. 4. Authorities upon the same Reason, Statute of *Sewers*, 23 H. 5. saith, That every one who may have Benefit or Loss shall contribute; yet it hath been adjudged, that if any particular Person be to repair a Bank by Prescription, he, and no other, shall repair it. 5 Rep. 100.

But Serjeant *Rolls* and others wrote *contra*:  
 1. Because the Lessor is Party to the Act of Parliament, and hath dispensed with it, as in 6 Rep. *Morris's Case*. 2. The Intent of the A&t was to ease the Lessee of part of the Burden, and put this Part on the Lessor.  
 3. *Alias*, the Lessee by the Force of the Covenant shall be driven to pay all the Rent to the Lessor, and yet to bear all the Charge of the Tax, and the Lessor shall have all his Rent, and shall pay no Charge of the Tax, which will be against the Words and Intent of the A&t; As to the Objection on the Statute of *Sewers*, the Book is not so, for the Commissioners may tax all if they will, upon the Words of the Statute. In a private Manuscript,

*Per Ch. Just. Rolls, & Just. Nichol, nulla contradicent*, in *Rawson and Marien's Case*, Trin. 1650. in *super Banco*, it was held, that if an Ordinance of Parliament is, that the Lessee shall deduct the Monthly Assessment for the Parliament Army out of his Rent, and the Lessee covenants in his Lease to pay all the Taxes and Charges, for or by Reason of the Land; if this Lease was made before the Ordinance, there the subsequent Order of Parliament

Parliament shall take away this Covenant, because every one is privy to an Act of Parliament; and so the Lessor, by this subsequent Ordinance, hath taken away the Covenant, and then it's all one as if the Lessor had said, I will pay it, and you shall not pay it; *alias*, if the Lease had been made after the Ordinance.

Agreement was made to assign a Stock upon Request, and for Non-performance, Action was brought, setting forth the Agreement, and that the Plaintiff did request the Defendant at such a Time, &c.

When a Thing is to be done upon Request.

Defendant pleaded, He was ready to assign the Stock after the Promise made, &c. and upon Demurrer it was ruled, if the Thing was not to be done upon Request, then the Defendant was bound to do it in convenient Time after the Promise; but it being to be done upon Request, the Time when the Plaintiff will require the Performance of the Agreement, is the Time when the Defendant must do it. 3 Mod. 295. *Harrison and Hayward.*

If A. recite by Deed, That where he is indebted to B. in 100*l.* he covenants with B. That the said 100*l.* should be paid to B. or his Assigns, at Rotterdam in Holland, by C. absq; aliqua secta Legis super primam Requisitio-  
nem quæ de eodem faceretur. In this Case, the Demand may be made at any other Place than Rotterdam; for though Payment is to be made there, yet he may demand it at any other Place in England, or at Dort, for he ought to have reasonable Time for Payment after Demand, having Respect to the distance of the Place. 1 Rol. Abr. 443. *Halsted's Case.*

Demand at other Place than Pay-  
ment.

Reasonable Time for Pay-  
ment.

## C H A P. XXVI.

*Request. Vide Notice, in Title Declaration.*

Request, to  
what pre-  
ceding Clau-  
ses it shall  
relate.

**I**F *A*, covenants with *B*, upon reasonable Request to him made by *B*, to surrender certain Land, and all his Interest in it to *B*, and also to permit *B* to take the Profits of the Land; in this Case the Request doth not go to the taking of the Profits, but only to the Surrender; so that he is bound to suffer him to take the Profits without Request, although there is but one Word that goes to the whole. 2 *Rol. Abr.* 248, 249. *Sims and Smith.*

Whereas *B*, per other Indenture, had assigned to *C*, a Messuage, &c. Now this Indenture witnesseth, that *R*. covenants, That he or his Brother would deliver to *C*, or, in his Absence, to *E*, at his Shop, a Tarrier of the Premisses, and of the Verity of this, *ad optimam eorum peritiam*, upon Request made to them by *C*, would take their Oath before a Master of the Chancery, and also would deliver to one *W*, safely to be kept to the Use of the said *B*, and *C*, the Original Demise, whereof he then had a Copy, &c. Though in this Case they are not bound to make Oath without Request, yet they are to deliver the Original Demise *sans* Request, for the Request refers not to this, but the first, as appears by putting the Request amongst the Covenants, and not in the Beginning or End. 2 *Rol. Abr.* 250. *Smith and Garbutt.*

The Plaintiff declares, That the Defendant had covenanted to pay him so much Money as he should expend for Repairing and Victualling a Ship for him; and avers, That he had spent 300*l.* in Repairing and Victualling it, and that he gave the Defendant Notice of it such a Day, and for Non-payment brings the Action. Defendant *Protestando*, That the Plaintiff had not laid out 300*l.* in Manner and Form as he had declared: Demurs to the Declaration; 1. Because he hath not averred a Special Breach of Covenant; but this hath been often overruled. 2. There is no Request alledged to pay the Money, and without Request he is not bound to pay it. *Per Cur'*, The Plaintiff's Action is not an Action of Debt where a Demand is necessary, but an Action of Covenant where it is not necessary to alledge a Demand. *Stiles Rep.* 31.

Where a  
Special  
Breach of Co-  
ovenant need  
not be al-  
ledged.

Where it is  
not necessary  
in Covenant  
to alledge a  
Demand.

The Condition was, to make Assurance of certain Lands to the Obligee before the 10th of *March*, 17 *Eliz.* and if it fortunes, that the Obligee refuse to accept the Assurance, and shall make Request to have 100*l.* in Satisfaction of it; then if upon such Request, within 5 Months after, he pay the 100*l.* that then, &c. and at the Day he refused the Assurance, and afterwards, 27 *Eliz.* he maketh Request to have the 100*l.* The Qu. was upon Demurrer, Whether this Request was sufficient for the Time? *Per Cur'*, A Request at any Time, during his Life, was good, and he is not restrained to make it at or before the Day the Assurance was to be made. *Judgment pro Quer' Cr. Eliz. 136. 1 Lev. 185.*  
*Mesme Case.*

Request dur-  
ing Life.

Covenant to make a good and lawful Estate, as by the Council Learned of the Plaintiff, upon Request made, shall be advised; and Plaintiff alledgedeth M. T. was of his Council Learned, and gave his Advice to the Plaintiff, that the Defendant should make such Assurance, &c. and that the Plaintiff gave Notice to the Defendant of the said Advice, and requested him to perform it, and the Defendant denied.

It's most proper the Councillor shall give his Council to him, with whom he is of Council; and he, to notify it to him that makes the Estate, and if the Councillor gives Advice to him that is to make the Estate, he may be ignorant whether he be of his Council or not. § Rep. 19. b. Higginbotham's Case.

In Consideration the Plaintiff had promised to pay the Defendant 700 l. for the Reversion of a Mannor, the Defendant covenanted to seal the Instrument for the Assurance of it, with Warranty, &c. according to the Draughts between them before agreed; and though the Defendant tendered to him the 1st of March the Instrument written, Secundum tractationes præd', and the 3d of March requested him to seal them, yet he had not sealed them, nor conveyed the Reversion of the Mannor; after Verdict pro Quer', moved in Arrest of Judgment,

i. That he ought to shew the Instruments to the Court, that they might judge of them; to which it was answered and resolved, the Instruments were agreed before, and therefore he need not shew them to the Court.

**Covenant to convey according to the Draughts agreed, he need not tender Wax, &c. for he had taken it upon him.**

2. He doth not shew that he tendered him Wax, Pen, Ink, &c. as he ought; to which it was answered and resolved, There need no Tender, for the Defendant had taken upon him to do it.

3. The Request is not well made, being at another Time, not when the Tender was; but it was resolved the Tender after the Request was the better, for so he had Time to read them and consider them.

And by *Windham*, Justice, where Conveyances are before agreed, and to be sealed according to this Agreement, so that there is not any need of Council, the Defendant is to do it at his Peril; and where one is to grant a Reversion, he had Time to do it at any Time during his Life, if it so long continue a Reversion, if he be not hastened by Request. Here is a Request, and the Conveyances being agreed, no Tender need to be; but if one be to seal a Conveyance generally, there the Council of the Purchaser is intended to draw them, and then the Purchaser ought to tender them. *i Lev. 44.*

When Ten-  
der of a Con-  
veyance is re-  
quisite or not.

*Webb and Bettel. i Keeble 122. Mefme Case.*

## C H A P. XXVII.

*Covenant, That he is seized in Fee.*

Covenant,  
That he was  
seized in Fee,  
without Con-  
dition.

**C**Oovenant, That he was seized in Fee at the Time of the Bargain and Sale, without Condition or Limitation, and the Breach assigned by the Plaintiff that he was not seized in Fee, he is not bound to shew in whom the Estate was, to which the Bargainer only is privy ; as 9 Rep. 61. Also his Replication could have been only, That he was seized in Fee, and not *absque hoc*, That any Stranger was seized ; and it is a good Covenant that he is seized in Fee, and the Words, [Without Condition or Limitation] by *Windham*, is *super addition*, That he hath a good Estate in Fee, and doth not qualify or alter the Fee, tho' Condition must be shewed by him that pleads, that he was seized in Fee, confessing it, but that it was on Condition. *Quære*, 1 Keb. 58. *Glimston* and *Audley*.

A Covenant, That he is seized of a good Estate in Fee ; the Plaintiff takes Issue by Replication, That he was not seized of a good Estate in Fee. Defendant rejoins, he was seized of as good an Estate as Sir *J. Woolaston*, who granted it to him, had ; which is nothing to the Purpose, because that he was seized of a good Estate, according to such an Indenture, refers to the Estate passed by the Indenture it self, and not to him that made it ; which the Court agreed, and Judgment *pro Quer'*. 1 Keb. 95. *Cookes and Fownes Case*.

It is reported thus, in *i Lev. fol. 40.* Covenant and declares, That the Defendant bargained and sold to him certain Lands, (which he had purchased of *Woolaston* and other Trustees, in the late Times, for the Sale of Delinquents Estates) and covenants, That he was seized of a good Estate in Fee according to the Indenture made to him by *Woolaston, &c.* and assigns for Breach, That he was not seized of a good Estate in Fee. The Defendant pleads, he was seized of so good Estate as *Woolaston, &c.* conveyed to him. Plaintiff demurs, and Judgment was given for him, for the Covenant is absolute that he is seized of a good Estate in Fee, and the Reference to the Conveyance by *Woolaston* serves only to denote the Limitation and Quality of the Estate, not the Defeasibleness or Undefeasibleness of the Titles.

Covenant,  
That he is  
seized in Fee  
according to  
the Indenture  
by which he  
purchas'd the  
Covenant, is  
absolute.

*i Lev. 40.*

Lessor covenants, That he was then seized in Fee of an indefeasible Estate. The Plaintiff in his Declaration, *in facto dicit*, That at the Time of making the Indenture he was not lawfully seized in Fee, and so he had not performed the said Covenant. Defendant pleads, *non est factum*. The Breach is well assigned, though he shews not that any other was seized, because the Covenant is general, and so the Breach may be assigned as generally, especially as this Case is, where the Defendant hath made the Declaration good by Pleading *non est factum*. So he allows the Breach, if it had been his Deed. *Cro. Jac. 369. Misericordia et Balaust.*

Breach may  
be assigned as  
general as the  
Covenant is.

## The Law of Covenants.

B. covenants, he was seized of Black-Acre in Fee-Simple, whereas in Truth it was Copyhold Land in Fee. *Per Cur'*, the Covenant is not broken: *Quare*, because the Reporter adds, the Jury shall give Damages according to that Rate that the Country value Fee-Simple Lands more than Copyhold. *Noy. 142. Gray and Briscoe.*

Covenant, That the Defendant was lawfully seized, is intended as to the Title, and a Covenant for quiet Enjoyment is as to the Possession. *3 Keb. 755. Gregory and Mayo.*

### *Covenant that he hath Power to sell.*

I now have Heirs and Assigns by these Presents, by the Will aforesaid, do own full Power, good Right, and lawful Authority, to sell, good, and the Words [Heirs and Assigns,] are insensible and Surplusage; he ought to be Owner of a Power, as well as Owner of the Land. *1 Rol. Rep. 84. Goodman and Knight.*

### *That the Lease is a good Lease.*

On a Lease  
by Tenant in  
Tail, and not  
warranted by  
the Statute.

In Covenant by Lessee of Tenant in Tail, not warranted by the Statute (on Assignment to the Plaintiff), That he was possess'd of the Indenture, and that it was unavoidable and unavoidable; Tenant in Tail dies, and Breach assigned, that the Issue entered and demurred thereon: The Courts inclined this was no Breach, unless it had been, that it should continue so during the Term, or that the Assignee should enjoy it during the Term, *for the Lease is only voidable on the Contin-*  
*gent*

gent of the Death of Tenant in Tail. 3 Keb.  
816 Hemingway and Sad.

By Agreement between the Plaintiff and the Testator of the Defendant, a Parcel of Land was to be sold for 400 £ but if it did not arise to so much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Testator covenanted for himself and his Executors, to pay his Proportion to the Plaintiff, so as the Plaintiff gave him Notice in Writing by the Space of 10 Days, but saith not such Notice was to be given to his Executors or Administrators.

Notice in  
Writing to  
Executors.

On Oyer of the Indenture, there was a Variance between the Covenant (which was for Notice to be given to the Testator) and this Declaration, by which Notice is averred to be given to the Executor, and so a Demurrer. *Per Cur'*, this is no material Variance, because the Covenant runs in Interest and Charge, and so the Executor is bound to pay, and therefore it is necessary that he should have Notice: But the Declaration was nought for another Reason; They had not declared that this Notice was given in Writing, and that he gave Notice, *Secundum formam & effectum Conditionis*, was not good.

2 Mod. 268. *Harwood versus Hilliard.*

## C H A P. XXVIII.

On a Covenant in a Feoffment that he was Owner, and seised of an indefeasible Estate, &c.

Considera-  
tion.

**A**. B. nuper de B. in Com<sup>y</sup> præd' Gen' alias Warw. dict', [A. B. of B. in the County of Warwick,] summonit' fuit ad respond' J. C. Ar' de placito quod teneat ei conventionem inter eos factam secund' vim formam & effectum quarundam Indenturarum inter eos conjectar', &c. Et unde idem J. per F. G. Attorn' suum dicit quod cum præd' A. per quandam Indentur' factam apud K. (tale Die & Anno) inter præd' A. per nomen, &c. ex una parte & præd' J. per nomen, &c. ex altera parte, cuius alteram partem, Sigillo præd' A. Sign' idem J. hic in curia profert cuius dat' est iisdem Die & Anno testatum sit quod præd' A. B. pro & in Consideratione summe ducendarum & undecim Librarum legalis Monetæ Angliae ei per præfat' J. C. ante sigillationem Indenture præd' bene & fidelit' satisfact' & solut' unde præd' A. B. per Indenturam præd' acquietavit & relaxavit præd' J. C. Executores & Administratores suos imperpetuum dedisset concessisset barganziasset vendidisset feoffasset & confirmasset præfat' J. C. Hæredibus & Assignat' suis totum manerium de, &c. cum omnibus juriibus partibus annex' membris hereditamentis & pertinentiis quibuscumq; inde vel ad eadem inciden vel spectan' ac omnia illa messuagia terras tenementa vel hereditamenta cum pertin' communit' vocat' vel cognit' per nomen sive nomina de, &c. in paroch' de K. in Com<sup>y</sup> Warwick, ac etiam omnia & singula Domos edificia structuras,

structuras, [Anglice, Buildings,] pomaria gardina  
 prata terras pasturas pascuas vast communias mo-  
 ras moriscos boscos suboscos reddit' reveriones rema-  
 neria officia, [Anglice, Duties,] servitia proficia  
 emolumenta communitates, libertates franches im-  
 munitates & hereditamenta cum suis pertinentiis  
 quæcunq; existentia part' parcel' vel membra præd'  
 manerii de C. vel tenementorum de M. H. vel ill'  
 vel alteri eorum spectan' vel sic accept' reputat' vel  
 capt' vel cum eisdem vel eorundem altero vel ali-  
 quâ parte inde ante tunc, [Anglice, heretofore,]  
 locat' [Anglice, sett,] dimiss' [Anglice, let,]  
 capt' & fruct' scituat' jacen' & existen' in, &c.  
 (manorio de C. cum omnibus suis partibus mem-  
 bris & pertinentiis ex concessione præd' except' &  
 foris priuat') omnia que Præmissa præd' A. B. nuper  
 perquisivit sibi & Hæredibus suis imperpetuum de  
 F. T. de, &c. simul cum omnibus scriptis chartis  
 cur' rotulos escript' instrument' & evidenciis quibus-  
 cunq; concernent Præmissa totum vel aliquam par-  
 tem vel parcel' inde habend' & tenend' præd' ma-  
 nerium de T. & præd' Præmissa in Parochia, &c.  
 & omnia & singula alia Præmissa quæcunq; cum  
 suis pertinentiis ante per Indentur' præd' dat con-  
 cess' borganizat' vendit' & confirmat' mentionat'  
 [Anglice, mentioned,] intens' [Anglice, inten-  
 ded,] dari borganizari vendi enfeoffari & confir-  
 mari præfat' J. C. Hæredibus & Assignat' suis  
 imperpetuum ad solum opus usum & beneficium,  
 [Anglice, behoof,] præd' J. C. Hæredum & Af-  
 signatorum suorum imperpetuum. Et præd' A. B.  
 & Hæredes sui omnia & singula Præmissa cum  
 pertinentiis præfat' J. C. Hæredibus & Assignat'  
 suis imperpetuum contra omnes gentes War' antiza-  
 rent & per Indentur' præd' defenderent. Et præd'  
 A. B. pro seipso Hæredibus, Executoribus, & Ad-  
 ministeritoribus suis, & quolibet eorum per Inden-  
 turam præd' convenit promisit & concessit ad &

cum præfat' J. C. Hæredibus, Executoribus, & Administratoribus, & Assignat' suis, imperpetuum & ad cum quolibet eorum quod ipse præd' A. B. ad sigillationem & deliberationem Indentur' præd' fuit verus Proprietarius, [Anglice, Owner,] & legitimate seisi' de & in singulis Præmissis cum suis pertinentiis præantea per Indentur' præd' dat concess' barginat' & vendit' vel mentionat' [Anglice, intended,] dari concessi' barganizari & vendi & de qualibet parte & parcella inde cum suis pertinentiis boni perfecti & indefecibilis status Hæreditat' [Anglice, Inheritance,] in feodo simplici absq; aliqua defeasantia conditione vel limitatione usus vel confidentie, [Anglice, Trust,] ad evanquand' [Anglice, to avoid,] alterand' [Anglice, to alter,] mutand' determinand' vel transferend' eadem & quod ipse habuisset plenam potestatem bonum jus bazzilitatem & autoritatem in lege concedere barganizare vendere enfeoffare & conveyare eadem & quamlibet partem & parcell' inde præfat' J. C. Hæredibus & Assignat' suis, modo & forma superdicti & secundum intentionem Indenture prædicti [and a Covenant to stand sealed.] Et idem J. ultius dicit quod licet ipse a tempore confectionis Indentur' præd' usq; diem imputationis brevis originalis ipsius J. bene & fideliter obseruavit performavit perimplerit & custodivit omnia & singula conventiones concessiones & agreeamenta in Indenture præd' superius spec' ex parte ipsius J. obseruanda perimplenda performanda & custodienda secundum formam & effectum Indenture prædicta protestando etiam quod præd' A. B. non obseruavit perimplerit performavit seu custodivit aliqua concessionem seu agreeamentum in Indentura prædicta superius specificat' ex parte ejusdem A. observand' performand' perimplend' & custodiend' secundum formam & effectum Indenture præd'. In facto idem J. dicit quod præd' A. tempore sigillationis & delibera-

Breach.

tioniis Indenture prædicte hic in Cur' prolat' non fuit. That he was  
 verus Proprietarius, [Anglice, Owner,] & legit' not Owner,  
 item seistus de omnibus & singulis Præmissis præd. &c.  
 cum pertinen' [except præ extept',] antea per  
 Indenturam illam dat' barganizat' concess' & ven-  
 dit' vel mentionat' inten' [Anglice, intended,]  
 dari concedi barganizari & vendi & de qualibet  
 parte & parcella inde cum pertin' bone perfecte &  
 indefesibilis status Hæreditatis in feodo simplici  
 absq; aliquibus defezantia conditione vel limita-  
 tione usus vel confidentia, [Anglice, Trust,] evan-  
 cuare alterare, [Anglice, change,] determinare  
 vel transferre eadem secundum formam & effectum  
 Indenture prædicte. Et idem J. ulterius in facto  
 dicit quod præd' A. tempore sigillationis & delibe-  
 rationis Indenture prædicte hoc in Cur' prolat' non  
 habuisset plenam potestatem bonum jus habilitatem  
 & autoritatem in Lege concedere barganizare en-  
 feoffare & conveyare Præmissa prædict in Indentu-  
 ra præd' superius specificat' & quamlibet partem &  
 parcellam inde prefat' J. C. Hæredibus & Assig-  
 nat suis secundum formam & effectum Indenture  
 illius. Et sic idem J. dicit quod præd' A. licet se-  
 pius requisi' conventionem præd' de eo quod præd'  
 A. per Indenturam præd' pro seipso Hæredibus, Ex-  
 ecutor' & Administr' suis & eorum quolibet con-  
 venit promisit & concessit ad & cum præd' J. C.  
 Hæred' Executor' & Administratoribus suis, & ad  
 & cum quolibet eorum quod ipse præd' A. B. ad  
 sigillationem & deliberationem Indenture præd' fuit  
 verus Proprietarius & legitime seistus fuit de om-  
 nibus & singulis Præmissis cum pertin' præantea  
 per Indenturam præd' dat' concess' barganizat' &  
 vendit' aut mentionat' & inten' dare concedi bar-  
 ganizari & vendi & de qualibet parte & parcella  
 inde cum pertin' de bono perfect' & indefesibili  
 statu Hæreditat' in feodo simplici absq; aliquibus  
 defezantia conditione sive limitatione usus vel con-  
 fidentia,

fidentia, [Anglice, Trust,] evacuare alterare mutare determinare vel transferre eadem & quod ipse habuit plenum bonum jus habilitat' & autoritatem in Lege concedere barganizare vendere enfeoffare & conveyare Præmissa præd' & quamlibet partem & parcell' inde præfat' J. C. Hæredibus & Assignat' suis, modo & forma præd' & secundum intentionem Indenture præd' eidem J. non tenuit sed infregit & illam ei tenere hucusq; contradixit & abduc contradicit unde dicit quod deteriorat' est & dampnum hæc ad valentiam quinquagint' Librarum & inde produc' sectam, &c.

*A.* conveys a Messuage with the Appurtenances to *B.* and his Heirs, and also grants to him Liberty of Ingress to a Well, &c. to draw Water, &c. And *A.* covenants with *B.* that he was seised of the Premisses: It's no good Breach, that *A.* was not seised in Fee of the Well, for that the Covenant that he was seised in Fee of the Messuage and Premisses, doth not extend to the Well,  
*Lut.* 608.

Notice.

## Notice.

*Who ought to give Notice. To whom Notice ought to be given.*

If a Man covenant with *J. S.* That if he will marry *A. W.* his Cousin, to pay to him 10*l.* at the Day of his Marriage, *J. S.* need not give Notice at what Day he will be married, but he ought to take Notice of it at his Peril, in as much as he hath taken upon him to pay it at the Day, tho' the Marriage is to be made by *J. S.* himself, *Beresford and Good-rouse, 14 Jac. Quære.*

Notice of  
Marriage.

If *A.* sell Lands to *B.* by the Name of Twenty Acres, according to the Rate of 20*l.* for every Acre; and it is agreed between the Parties, that the Land shall be measured by *J. S.* before the First Day of *Jan.* next ensuing, and *A.* covenants to repay according to that Rate for every Acre before the First Day of *May* after: If there are not Twenty Acres upon the Measure, and it's found there are not Twenty Acres, *A.* ought to pay this before *May* at his Peril, without any Notice given how many Acres there wants of Twenty, for he had taken upon him to perform it at his Peril, *Goates and Sir Baptist Hycks Case, 1 Rol. Rep. 314. 2 Cro. 390. id. Cases.*

Where a Man takes upon him to perform a Thing at his Peril.

If *A.* covenant with *B.* to make such Assurance to him of the Mannor of *D.* as the Council of *B.* shall devise, before such a Day, and after the Councel deviseth an Assurance, *B.* ought to give Notice of it to *A.*

Notice of  
Assurance.

If

To find great  
Timber for  
Reparation.

If a Man lease a Mill for Years, and the Lessee covenants to repair the Mill, and Lessor covanants to find him great Timber for it; the Lessee ought to give Notice to the Lessor how much will suffice for the Reparation, and not to demand Timber for Reparation in general, or otherwise the Lessor is not bound to deliver any, *Holler and Taylor*,

*12 Jac. B.*

*A. covenant to pay to B. all such Money as by a true and justifiable Bill under the Hand of the Attorney of B. shall appear to be before disbursed by B. or his Attorney. In Action, if B. assign for a Breach, that 24. by a true and justifiable Bill under the Hand of J. S. Attorney of B. appears to be disbursed, which A. hath not paid: This is a good Breach, without alledging A. had Notice of it, or that the Bill of the Attorney was shewed to him, for that the Attorney was a Stranger, of which A. ought to take Notice at his Peril, *Dewell and Wilmott*.*

To take No-  
tice at his  
Peril.

Notice of Ac-  
surance.

*If I be bound to you to make you such an Assurance as J. S. shall devise, I am bound at my Peril to procure Notice; but if I be bounden to you to make such Assurance as Council shall advise, there Notice ought to be given to me. *I Leon. 104. Q. this Book.**

*The Defendant covanants to pay the Plaintiffs and other Mariners their Wages; and the Plaintiff avers, that 5 l. was due for a Month after his Departure in the Ship such a Day from Blackwall; but avers no Notice given to the Defendants of his Return, or going out, nor what was due, for which Cause the Defendant demurs. And per Cw, the Defendant hath bound himself, and must take Notice of it, as well as if it were to do a Thing*

Bound him-  
self to take  
Notice of it.

a Thing in his own Conisance, 1 Keb. 681.  
Eli and Roberts.

T. Lessee of the Bishop of R. pro Years, covenants to find necessary Provision for the Steward, the Bishop, his Servant and Horse, at all Times that he held Courts there. Per Dodderidge, he shall take Notice, and there needs no Personal Notice, for General Notice, as Proclamation at Court, is given to him, Palmer 532. the Bishop of Rochester versus Young.

General No. tice, as upon a Proclama-  
tion in Court, where suffi-  
cient.

In Covenant, the Plaintiff declares upon a Writing of the Defendant's Testator, acknowledging himself to be accountable to the Plaintiff for whatever Money the Plaintiff should charge upon J. S. payable to Sir Tho. Viner. Per Cur' it lies well, being against Executors, and so had it been against the Party himself; no Notice is given by the Plaintiff to J. S. who upon such Bills was to pay to Sir Tho. Viner, and it's not necessary,

Where No. tice nor ne-  
cessary.

1 Keb. 155. 1 Lev. 47. mesme Case.

In Point of Covenant, Notice is not to be so strictly given as upon an Obligation, which is in Point of Forfeiture, Cr. Jac. 390.

Sir Baptist Hicks's Case.

## CHAP.

## C H A P. XXIX.

*Covenants concerning Copyhold Estates.*

**T**H E Condition is, That he shall make a good, absolute, and perfect Assurance, in Fee of Copyhold Lands, and after he surrenders this upon Condition of Payment of Money : It is not any Performance, for the Assurance ought to be absolute ; and it must not only be an absolute, but an effectual Conveyance.

Covenant to surrender, it must be an absolute and effectual Surrender.

If a Man be bound to surrender a Copyhold to the Use of *A.* and his Heirs, on Consideration of Money ; if he surrender it into the Tenants Hands, he must get it presented, for it must be an effectual Surrender,

*1 Rol. Abr. 425. Shan and Belby.*

The Defendant covenanted, that she would make a lawful Surrender of such Copyhold Lands upon reasonable Request, and that she would permit the Plaintiff to enjoy the said Land, and to receive the Rents quietly, without Interruption. And the Plaintiff shews she was a Copyholder of such Lands, and alledges the Custom, that she might surrender by Letter of Attorney into the Hands of Two Tenants out of Court, and shews he caused a Letter of Attorney to be made for the Defendant to seal, to give Authority to Two such Persons named therein to surrender at the next Court, and tended it unto her to seal, and she would not seal it, nor surrender at the next Court holden on such a Day, and that she received the Rents of the

said Lands for such a Time, and so brake her Covenant by not surrendring upon that Request. Defendant pleads, That the Plaintiff tendered a Letter of Attorney to her to seal, and because she did not know what was therein contained, she required reasonable Time to be advised by her Council, and the Plaintiff refused to give her any Time to advise thereupon, for which Cause she did not seal it. Plaintiff demurs.

*Per Cur'*, First, The Breach is not well assigned, for she is by her Covenant to make Surrender upon Request, but is not bound to make a Letter of Attorney to make a Surrender. It was moved it is a Breach of Covenant, because she did not surrender at the next Court; and that a Request to make a Letter of Attorney to surrender, implied a Request to make a Surrender, *sed non alloc'*, for it ought to be an express quest. Request to make a Surrender, and not an implied one, Cr. Car. 299. Syms and Lady Smith, Godb. 445. Jones 314.

Error of a Judgment in *B. C.* where the Plaintiff declares, That it was agreed between him and the Defendant, that the Plaintiff should surrender to the Defendant certain Copyhold Lands, and that the Defendant should pay to the Plaintiff so much; and in Consideration that the Plaintiff had assumed to perform the Agreement on his Part, the Defendant assumed to perform the Agreement on his Part, and avers, he surrendered into the Hands of Two Copyholders, according to the Custom, to the Use of the Defendant, and that the Defendant had not paid. Defendant demurs, Judgment *pro Quer'*, in *B. C.* Error brought and assigned, that the Surrender into the Hands of

Reasonable  
Time to ad-  
vise about the  
Surrender.

By Covenant  
to make a  
Surrender  
upon Request,  
not bound to  
make a Letter  
of Attorney.

Express Re-  
quest.

Agreement  
to surrender  
Copyhold to  
the Use of A.  
If surrender  
into the  
Hands of  
Two Copy-  
holders, ac-  
cording to  
the Custom,  
be a good  
Perfor-  
mance?

## The Law of Covenants.

of Two Copyholders was not a good Performance on the Part of the Plaintiff; but it was answer'd upon Agreement to Surrender, generally, surrender any Way is sufficient; but *Twisden* held this Surrender no Performance; *Reling contra*: But *per Cur'*, here being mutual Promises, no Averment need to be of the Performance, and therefore ill Averment of that which need not be averred shall not hurt, the Judgment was affirmed, *1 Lev. 293. Beatty and Turner, 2 Keeble 666.*

& 1 Mod. 61. *id. Casus.*

**Covenant to assure Copyhold Land,**  
**Covenantor ought to procure a Court to be held.**

Covenant that he should assure such Copyhold Lands to the Plaintiff, if he married with his Daughter *secundum Leges Ecclesiasticas*; and alledgedeth, that he rite & legitime espoused the Daughter of the Defendant. *Per Cur'*, it is sufficient to the Plaintiff to alledge *licet sepius requirivit*, without giving Notice of the Marriage, for he at his Peril ought to take Notice thereof; and he need not shew a Court to be holden, for he ought to procure a Court to be held. *Cr. Jac. 102. Fletcher and Pynson. 1 Lev. 41. Bassett and Morgan.*

Surrendree or Assignee of a Reversion of a Copyhold Estate may bring Action of Covenant against Lessee for not repairing of the Premisses; and that he is within the Equity of the Statute, *32 H. 8. c. 34. 4 Mod. 80. Glover and Cope.*

CHAP.

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C H A P. XXX.

*How and in what Cases an Infant shall be bound by his Covenant, or not.*

**I**nfant shall not be bound by his Covenant, unless for Necessaries ; or by Covenants in Indenture of Apprentiship.

Now Infant shall be bound by his Contract for Necessaries, (*viz.*) Diet, Apparel, Learning, and necessary Physick ; therefore it was adjudged in *Dale and Copping's Case*, the Covenant of an Infant to pay Money for the Curing him of the Falling-sickness, is good.

In 2 *Rol. Rep.* 271. by *Haughton*. If Infant have Houses, it is necessary for him to have them in Repair, and yet Contract to repair doth not bind him ; no Contract binds him, but what concerns his own Person.

If Infant promiseth another, That if he will find him Meat and Drink, and pay for his Learning, that he will pay him 7*l. per Annum*, Action lies on this Promise ; and altho' it is not mentioned what Learning it is, yet it shall be intended that that is fit for him, until it be shewed to the Contrary of the other Part, 1 *Rol. Abr.* 729. *Pickering's Case*.

Learning, tho' it be not necessary *de esse*, yet it is so *de bene esse* ; & *omne quod est utile est aliquando necessarium*, 1 *Inst.* 172. *Pal.* 528.

But Contract for Dancing is not binding.

It was a Question in *Whittingham and Hill's Case*, Whether an Infant buying of Necessaries to maintain his Trade were binding or not ? Error of a Judgment was brought in

## The Law of Covenants.

*Shrewsbury* in *Affumpſit*, to pay such a Sum for Wares sold. Defendant pleads, he was within Age at the Time of the Wares being sold. Plaintiff *protestando*, that he was not within Age: *pro Placito* saith he bought them *pro necessario victu & apparatu, & ad manutenciam familie sua*. Defendant rejoins, that he kept a Mercer's Shop at *Salop*, and bought these Wares to sell again, and traverseth that he bought them *pro necessario victu & apparatu*. Plaintiff demurs for whom it was adjudged. Error was assigned in Point of Law, that such Buying shall not bind an Infant: And *per Cur'*, his buying to maintain his Trade, tho' he get his Livelihood by it, shall not bind him, *Cr. Jac. 494.*

But if an Infant is Housekeeper, and buys Necessaries for his Household, it shall bind him, *3 Keb. 387.* and adjudged so in *Hill and Blackstone's Case* there cited. *Q. le Liver.*

It was said by *Coke, arguendo in Stone and Withypool's Case*, *1 Leon. 113.* In Debt against Infant on Contract for Necessaries, the Plaintiff ought to declare specially, so as the whole Certainty may appear; upon which the Court must judge, if the Expences were necessary or convenient, or not, and also upon the Reasonableness of the Price: But in *Russell and Lucy's Case*, *1 Keb. 382.* & *1 Lev. 86.* the Particulars are needless to be set forth. It must be averred in the Declaration, that the Clothes were for his own wearing, and that they were convenient and necessary.

Infant and another of full Age covenant one against the other, the Covenant of the Person who is of full Age shall bind him ;  
1 Sid. 446. *Farnham and Atkins.*

*As to Covenant in Indentures of Apprentiship, vid.  
Tit. Apprentices.*

In Covenant to instruct an Apprentice, or cause him to be instructed in the Trade of a Sadler, and to find him Meat, Drink, and Lodging during the Term. The Plaintiff shewed the Testator's Death, and that such a Day he was turned out of Doors by the Defendant, *& si conventionem fregit in hoc,* (*viz.*) in not instructing him, &c. Defendant demurs, because it is a Personal Covenant, and discharged by Death, and cannot Discharge be assigned : But all the Court inclined, had it been only to instruct, it had been discharged, but being complex to instruct and to find Meat, it is not ; and if it were, yet the Breach is sufficiently assigned, if either Part be true, as here in turning him out. Judgment *pro Quer'*, 1 Keb. 820. *Wadsworth* against the Executors of Guy.

## C H A P. XXXI.

*Covenant free from Incumbrances.*

**C**ovenant in a Bill, containing, That the Defendant granted to the Plaintiff all his Right, Title, and Interest, which he then had of and in the Lands in *B.* lately granted by *L. D.* or *Robert Fish* for Twenty Years by Indenture, and covenants with the Plaintiff that he is lawful Owner of the Indenture, Demise, Term of Years, and Premises; and that *dicta Praemissa* then were, and so shall continue discharged from all former Grants and Incumbrances made by the Defendant, or the said *Robert Fish*, and alledgedeth that *Robert Fish*, before the Assignment to the Defendant, had granted several Parts to several Persons for Twenty Years, and so a Breach. The Defendant pleads, and confesseth the Bill of Covenant, and saith that *Robert Fish* granted his Interest in the Lands, (excepting the Lands so severally demised;) and the Doubt was, whether it shall be intended he was Owner of the Term only, or the Term to him assigned, and of the entire Land, during the Term or not.

Whether one  
is Owner of  
the Term  
general, or  
the Term to  
him assigned.

Premises ex-  
tend to the  
Land and  
Term.

*Per Cur'*, the Word, *Premises*, which were to be discharged of all Incumbrances made by the Defendant, or *Robert Fish*, tend as well to the Land as to the Term; and the Word, *Premises*, need not to have been put in, if it intended only to have the Term granted to the Defendant to be discharged,

*1 Anderson 236. Only and Fish.*

Covenant

Covenant was, That the Plaintiff should have, hold, and enjoy the Lands, acquitted from all Charges and Incumbrances; and for Breach shews, there was a Rent-charge granted by the Predecessor, under whom the Defendant claimed, which is yet undischarged. The Defendant demurred, because the Acquittal goes to the having and holding the Land, and it's not shewed that the Plaintiff was ever in Possession, nor that he was charged or endamaged. To which, *Twisden* and *Keling* agreed; but *per Windham*, the Defendant ought to shew how he had discharged and acquitted him from the very Rent, and not to let it perpetually hang over him; *If the Acquittal refer to the Land, or to the Person,* but by all the Court, if the Acquittal refer to the Land it self, or to the Person, the Defendant must shew how, *1 Keb. 927. King and son, he must shew how.*

A Condition to discharge a Messuage of all Incumbrances: There one may plead generally, that he did discharge it of all Incumbrances; but if it be to discharge it of such a Lease, he must shew how, *1 Brownlow 63.*

If *A.* grant Lands to *B.* and his Heirs, rendering 10*l.* Rent, and *B.* doth sell the Land to *C.* and his Heirs, and doth covenant with *C.* that from such a Day he shall enjoy it discharged of all Incumbrances, and before that Day a common Recovery is had against *C.* in which *A.* is vouched, and this is to the Use of *C.* and his Heirs, supposing hereby that the Rent had been gone, which is not so; in this Case the Covenant is broken, for this Rent is an Incumbrance, *Hill. 20 Jac. C. B. Greenway and Tuckfald, per Cur'.*

*Kidwelly* was seised, and leased for Years to *J. H.* Husband of *Isabel*, and *J. H.* being so possessed by his Will, devised that the said *Isabel* should have the Use and Occupation of the said Lands for all the Years of the said Term as she should remain sole ; and if she died or married, that then his Son should have the Residue of the said Term not expired. *J. H.* died, *Isabel* entered, to whom the said *Kidwelly* conveyed by Feoffment the said Lands in Fee, and covenanted, that the said Lands from thence should be clearly exonerated *de omnibus prioribus Barganiis, Titul', Juribus, & omnes alias oneribus quibuscumque.* *Isabel* married, and the Son entered. *Per Cur'*, this Possibility which was in the Son at the Time of the Feoffment, tho' it was not Actual, yet the Land was not discharged of all former Rights, Titles, and Charges ; by the Marriage of the said *Isabel* it is become an actual Charge, and the Term is not extinct by the Acceptance of the Feoffment, *i Leon.* 92. *Rot. 120. Hamington and Rydear.*

Where Term  
not extinct  
by an Actual  
Feoffment.

Subsequent  
Charge.

I am bound in a Statute, and afterward sell my Land with Covenant *prout supra*, here the Land is not charged ; but if the Condition in the Defeasance be broken so as the Conifeer extends, now the Covenant is broken, *ibid.*

Two Lessors covenant to discharge the Lessee of all Incumbrances done by them, or any other Person ; One of the Lessors had made a Lease, and so a Breach ; it's a good Breach : The Covenant goes to Incumbrances done severally as jointly, *Pop. 200. Sanders and Meriton, Latch. 161. mesme Case, & Nov. 86.*

One devileth his Land to his Heir, paying a Rent-geek of so much *per Annum* to his Sister after his Death without Issue. Devisor dies; Devisee sells the Lands, and covenants, that it's free of all Rents, Incumbrances, &c. Now she had no Remedy for this Rent-geek, Rent-geek ex- because she had no Seisin, and then the Co- venant is so remote and uncertain. *Per Cur'*, <sup>the Word,</sup> it is expressly within the Word, *Rents*; but had it been only Incumbrances, it might have been a Question, *2 Sid. 167. Millway ces. and Medman.*

*Mason* leased certain Lands to *R.* for Years, and afterwards leased them to one *Tinter* for Years; *Tinter* covenanted with the Defendant, That if the said *R.* should sue the said *Mason* by Reason of the latter Lease, that then he would discharge and keep harmless without Damage the said *Mason*, and also would pay to him all the Charges that he should sustain by Reason of any Suit to be brought against *R.* in respect of the said former Lease: And *Mason* by the said Indenture covenanted with *Tinter*, that the said Land demised should continue to the said *Tinter*, discharged of former Charges, Bargains, and Incumbrances. And now upon the second Covenant, *Tinter* brought an Action of Covenant, and shewed, that the said *R.* had sued him in an *Ejectione Firme*, upon the said first Lease, and had recovered against him and *Mason*; pleaded in Bar the said second Covenant, intending that by that latter Covenant the Plaintiff had Notice of the said former Lease made to *R.* so as the first Lease shall be excepted out of the Covenants of former Grants, for otherwise there should be Circuit of Action. *Per totam Cur'*

**Covenant to Discharge, where goes to the Land, and where to the Possession.** *contra*, for the Covenant of *Mason* shall go to the Discharge of the Land, but the Covenant of *Tinter* only to the Possession, 3 *Leon.* 123. *Mason's Case.*

*Foster and Wilson against Mapps. Instr. Trin. 32 El. Rot. 71. B. R.*

**Breach as to not saving harmless, and shews not Disturbance by Title or Tort.**

Upon special Verdict the Case was, That the Defendant made a Lease of the Parsonage of *B.* and that he covenanted to save the Plaintiff harmless and indemnified, and also the Premises and the Profits of it, against one *Pb. Blunt* the Parson of *B.* and upon this the Plaintiff brought Covenant against the Defendant, and assigns a Breach, that the said *Blunt* had entered and ejected the Plaintiff; and it was objected for the Defendant, that the Plaintiff doth not shew that *Blunt* entered by Title, and then it shall be taken that he entered by Wrong, and so the Covenant not broken; for to save harmless, is only of lawful Harms, as in *Puttenham's Case*, *Dier* 306. *Puttenham* was condemned for Default in a *Scire fac' in Chancery*; upon Recognisance there, the Court commanded the Warden of the *Fleet* where *Puttenham* was in Ward, for other Causes, and him to detain in Execution upon the Condemnation aforesaid; the Warden takes a Recognisance of *Puttenham* to save him harmless against every one, and suffers him to escape; the Conifee sues the Warden for the Escape, who imparles, and sues *Puttenham* upon the Recognisance; Issue *non damnificatus*. *Per Cur'*, he is not damned, because he was not by Law chargeable for the said Escape, for *Puttenham* was never lawfully in Execution to the Plaintiff for the said

said Debt, because a *Capias* doth not lie for Execution on a Recognisance in *Chancery*; but the Council for the Plaintiff in the said Case of *Foster al contra*, for there is a Difference where the Covenant is general, and where special; and here, in as much as it is special to save harmless against *Pb. Blunt*, he ought to defend against him, be his Entry by Title or by Tort; and he cited *Catesby's* Case, *Dier 328*. Lessor covenants, that the Lessee shall enjoy his Term, *sine Ejectione vel Interruptione alicujus*; Lessee brought Covenant, because a Stranger entered, and saith not that he had Title, and Judgment *pro Quer'*. *Gaudy*; the Covenant is broken, for if *Blunt* disturbed him so that he could not take the Profits, it's a Breach, be it *per Tort* or Title, *2 Ed. 4. 15*. If the Covenant be to warrant the Land, that is only upon Title; but here, if the Lessee be *per Tort* or Title ousted for to save harmless, is stronger than to warrant: And *per Cur'*, the Covenant is broken; they agree, that *Catesby's* Case is not like this. *Fenner* vouched, *18 Ed. 4. 27*. where *H.* is bound to save *J. S.* harmless against me. If I arrest *J. S.* altho' it is tortious, the Bond is forfeit; which the other Justices denied to be Law, *1 Crok. 212, 213. Owen, p. 100, 101.*

*A.* covenants with *B.* before such a Feast to make a good, sure, sufficient, and lawful Estate in Fee-simple, of and in the Manner of, &c. discharged of all former Sales, Bargains, Charges and Incumbrances whatsoever, (Leases or Grants of Life, Lives, or Years, upon which the ancient and accustomeable Rent, or more, are reserved and payable, during such Estates only excepted.) If a Lease for Years, with the accustomeable

Rent reserved of the whole Mannor, or any Part made mean, between the Date of the Indenture of Covenant and the Delivery of the Deed, be a Breach? Q. for Three were against Two, *Dier* 139. Earl of Huntington and Lord Clinton.

Conisee of a Statute extends and assigns it to one, and after grants the Land to another, and covenants, That notwithstanding any Act by him, or any other by his Consent, that the Statute Extent and Execution shall be in force; and in Covenant this Assignment was assigned for Breach, and upon Demurrer adjudged for the Plaintiff, and in a Writ of Error this Judgment was reversed, for notwithstanding the Assignment, the Statute is in force; but if the Plaintiff *eo quod concessit* to him, which implies a Covenant, the Action had been maintainable; but the Breach is assigned in the Covenant only,

Notwithstanding an Assignment the Statute is in force.

Covenant not broken by the Assignment.

*Grant.*

which is not broken by the Assignment, for the Statute is in force after the Assignment, so that the Conisee may release; but if he had covenanted, that the Grantee shall hold without Disturbance, the Assignment had been a Breach of Covenant in the Law, implied in the Word, *Grant*, if the Action had been brought upon it, *Palmer* 388. Person's Case.

## C H A P. XXXII.

*Covenant that he had lawful Right and Title to let.*

THE Defendant lets the Manor of S. by Indenture for Ten Years, and covenanted, that he had lawful Right and Title to let it for that Term; Breach assigned, that he had not Right nor lawful Estate to let it, and so broke his Covenant. It is well assigned, tho' it is not shewed he had an Estate, nor how the Lessor had any Right, or that a Stranger had evicted him by Title, for the Covenant being general, the Breach may be assigned as general as the Covenant, and it lies not in the Plaintiff's Notice who had the rightful Estate; but the Defendant ought to have maintained, that he was seised in Fee, and had a good Estate to demise, and then the Plaintiff ought to have shewed a Special Title in some other, Cr. *Fac.* 304. *Salomon and Bradshaw*, 9 Rep. 60 b. *mesme Case*, & 1 Cro. 176. *Simms contra Smith*. *Aliter*, in Debt upon an Obligation, with Condition to perform Covenants, 1 Cro. *ibid.*

Bargainor covenants, that he is seised of a good, perfect, and indefeasible Estate in Fee, and that he had good Authority to sell, and that there is not any Reversion in the Crown by any Act made by him: The Qu. was, If these Words, [by any Act done by him,] shall refer to all? *Per Cur'*, not, but only to the last Clause.

Covenant

Covenant or Condition, before *Michaelmas*, to make, acknowledge, and suffer, &c. all and every such reasonable Acts and Things, whatsoever they be, for the lawful assuring, sure making, of the Mannor of D. to F. S. and his Heirs; Defendant pleads, That before *Michaelmas* the Plaintiff *rationabilit' non requiruit le Def' ad faciend'*, &c. aliqua *rationabilis actum & acta quæ forent pro bona & legitima Assurancia* of the Mannor. Plaintiff replies, *quod* such a Day before *Michaelmas* he requested. The Defendant, *quod ipse conveyaret & assuraret Manerium de D. to F. S. secundum tenorem Conditionis (conventionis) præd'*; found *pro Quer'*. Moved in Arrest, that no sufficient Breach was found, for the Plaintiff ought to have required an Assurance in certain, (*viz.*) Feoffment, Fine, &c. The Condition being special, all and every Act, &c. *Sed non allocatur*, the Issue is good, and the Condition is broken, for by the Condition the Defendant is to do all and every Act whatsoever; so that if the Plaintiff request a Fine, or, &c. then when the Plaintiff requested to convey the Mannor in generality, the Defendant ought at his Peril to do it by some kind of Assurance; and if he makes a Feoffment, yet if after the Plaintiff request a Fine, &c. he must do it, *Velv. 44. Pudsey and Newsham, 1 Brownl. 84. & Moo. 682. mesme Case.*

A Lease was made for Life by Baron and Feme, and the Covenant was, That he should make such reasonable Assurance as the Council of the Lessee should advise: The Council advised a Fine with Warranty by Baron and Feme, with Warranty against the Husband and his Heirs; it was moved it was not a reasonable Assurance, because the Warranty

**A general Request to convey, how expounded.**

**A Fine advised with Warranty, good.**

Warranty did reach to other Land ; but the Court over-ruled it, and said, it is the ordinary Course in every Fine to have a Warranty, and the Party may rebutt the Warranty, *Godb. 435. God and Winch's Case, Latch. 186. Tindal's Case.*

To make an Assurance, binds not to release with Warranty, *2 Leon. 120. Q. le Liver.*

Covenant to assure such Land by *reasonable Assurance*, as by the Plaintiff should be advised and required ; who devised and required an Indenture of Feoffment, with Covenant, to save and discharge him of all Incumbrances made by the Defendant, and for further Assurance, and for not sealing this Assurance the Action is brought. *Per Cur'*, on Demur to the Declaration, tho' these Covenants are ordinary and reasonable, yet the Agreement not being to make it with reasonable Covenants, but only reasonable Assurance, he is not bound to seal it, for it is not any Part of the Assurance, and an Assurance may be without Covenants, *Cr. Jac. 571. Coles and Kinder, Raymond 190. & 1 Sid. Quare.*

## C H A P. XXXIII.

*Covenants relating to Apprentices.*

*By what Covenants Apprentices are bound, though under Age.*

**I**nfant, by Custom of the Lands, may bind himself Apprentice by Indenture, and it shall be good. *2 Bulst. 192.*

*Covenant brought by Apprentice.*

Action of Covenant was brought by an Apprentice, and assigns for Breach, That the Testator of the Defendant had covenanted to instruct the Plaintiff in the Art of a Sadler for 7 Years, and to find him Meat and Drink during this Term; and that the Defendant, after the Death of the Testator, did put the Plaintiff out of his House, and so kept him from Meat and Drink. It was agreed, That & sic is a sufficient Averment of the Breach, and that it is not but Matter of Form: And as for the Law, the Opinion of the Court was, That the Apprentice remains an Apprentice to the Executor; for though he cannot instruct him, yet he may find him Meat and Drink, &c. *Per Hide,*

*Covenant to instruct, if discharged by Death.* this general Covenant to instruct is not gone by his Death, though there be no particular Custom, as in London, especially since the Statute 5 Eliz. 1 Sid. 216. 1 Keb. 761, 820. *Wadsworth and Eye.*

Covenant, by *Infant per Gard. suos*, for that he was bound Apprentice to the Defendant by Indenture, and he did keep him with Meat; and Defendant pleads, he was a Citizen and Freeman of *Bristol*, and that at the General Sessions of the Peace it was ordered, that he should be discharged from his Master for disorderly Living, and this Order enrolled by the Clerk of the Peace. *Per Cur'*, *præter Hales*, they had Power to discharge him; and it is frequent at Sessions so to do. *1 Ventr.*  
 174. *Watkins and Edwards.*

*Procter and Burdet's Case* was, *3 Mod. 69.* Action of Covenant brought by Apprentice. The Master covenants to find and allow the Plaintiff Meat, Drink, Lodging, & alia Necessaria, during such a Time, and the Breach was as general as the Covenant, *viz.* That he did not find him Meat, Drink, Lodging, & alia Necessaria. The Plaintiff had Judgment by *nihil dicit*, and on Enquiry entire Damages were given against the Defendant; Error was brought, That the Breach is too general, and entire Damages were given, amongst other Things, for alia Necessaria, and doth not say for what; and in *2 Cro. 436. Astell and Mill's Case*, Judgment was reversed for that Reason, but that Case has since been adjudged not to be Law; a Breach may be assigned as general as the Covenant. *Curia*, in a *quantum meruit*, they formerly set out the Matter at length, but now it is in general Words, [*Pro diuersis aliis bonis.*] and held good: There are indeed many Instances where Breaches have been generally assigned, and held ill; that in *Croke* is so, but the latter Opinions are otherwise, *affirmetur judicium.*

Breach may  
be assigned as  
general as the  
Covenant.

## Covenant against Apprentice.

**Departure in  
Pleading.**

Covenant was brought against an Apprentice on Indenture. Defendant pleads, he was within Age ; the Plaintiff in his Repli-  
cation maintain'd his Action by the Custom of *London*, That he may bind himself at the Age of 14 : The Question in 4 *Leon.* p. 77. and in *Cro. Eliz.* *Walker* and *Nicholson's Case*, was, Whether this was Departure in Plead-  
ing? and it was much doubted there, and the Case in 19 *R. 2.* was cited ; how that an Infant brought an Action against his Guardian in Socage ; who pleaded, That the Plaintiff was within Age ; the Plaintiff did maintain his Declaration, That by the Custom of such a Place, an Infant of 18 Years might bring an Account against his Guardian in Socage ; and it was held it was no Departure : So it was much argued in *Bold* and *Wallis's Case*, 14 & 15 *Car. 2.* *B. R.* because he brought his Action as at Common Law generally, and maintain'd it by a Custom. Some argued, That it was a Departure, and cited 1 *Inst.* 304. & *Keb. 76.* *Abbot of Buckface's Case*. It seemed to be agreed by all the Court, That where one alledgedeth a general Custom in a Count, and replies by a Special Cu-  
stom, that this is not good ; but by *Windham*, this is no Departure in the principal Case, being no Matter varying from the Count, that being but supposal, and always general ; this Special Matter is a good Support, and that this is no Departure from the Title, but an Answer to a Disability pleaded in Bar. *Foster* held it to be no Departure, the gift of the Action being laid in *London*, and the Title

Title is the same still, only the Person enabled, *Winch* 63. But by *Twisden*, all the Precedents are to Count on the Custom, as being the Ground of the Action; and he was of Opinion, That it was a Departure, but the Court gave Leave to the Plaintiff to discontinue his Action, and to declare on the Custom of *London*, that an Infant may bind himself.

Covenant; Plaintiff declared, That the Defendant, by his Deed shewed in Court, did covenant to satisfy the Plaintiff all such Sums of Money as  $\text{f}.$  his Son, the Plaintiff's Apprentice, should imbezel from him, within 3 Months after Request, and then lays the imbezelling and Request, &c. The Defendant prays Oyer of the Deed, which was entered in *hæc verba*; and there the Covenant was to satisfy within 3 Months after Request, and due Proof made of such imbezelling. The Issue was, Whether he imbezelled? and found *pro Quer*. Judgment was arrested, because it appears by the Entry of the Deed, that the Plaintiff ought not to have brought this Action until the 3 Months were incurred, as well after Proof, as after Request: Whereas the Plaintiff had averred no Proof in the Declaration, and the Word [Proof] generally laid, shall be understood [Proof] how Proof Judicial, by Jury, Confession or De-  
murrer in Court; but if the Form of Proof were by Writing otherwise appointed, that shall prevail, as by Witnesses before Two Aldermen, by Certificate, &c. which Proof shall be set down in the Plea, with all the Circumstances, and then it shall be in the Discretion of the Court, whether the Proof were competent according to Meaning of the

Writing; but in this Case, Proof may be made in Court judicially, in Action brought against the Apprentice, before the Action brought on the Covenant, made by another; and so it may well be taken for Proof by Trial in Court. *Hob. 217. Crockhas and Woodward.*

Collateral Covenants shall not bind an Infant, as in Action of Covenant brought against the Infant, on Covenant to serve his Master faithfully, as an Apprentice, in the Mystery of a Draper; and he lays in the Action, That he defrauded him of his Goods. *Per Cur'*, the Statute *s Eliz.* is not so strong against Infants as to make collateral Covenants good. Infant is not bound by those Words at Common Law, and no collateral Covenant shall be maintainable upon that Statute. Action on the Case lies on the Covenant in Law, but not on the Covenant in Fact, and for that he ought to have collateral Security; and the Retainer is, for the Benefit of the Infant to learn his Trade, but the Covenant is to his Disadvantage; but *Winch* thought the Covenant to be good, being incident to the Retainer. There is no Remedy but by Action on the Case. *Winch 63. Flemming and Pitman.* Vide *Hetl. 63.*

Covenant was brought upon Indenture of Apprentiship, containing the usual Covenants in such Indenture, and he ran away with his Master's Money in *London*; and Two Exceptions were taken to the Declaration:

i. In the Indenture, the Words are, That the Infant shall be Loyal and Faithful, & *secreta sua velare, &c.* without any Words of Co-

Covenant express; but it was resolved, That the Words imply a Covenant.

2. It was excepted, That Infants shall be bound by Covenant, is pleadable no where but in *London*; (the Custom is, That Infant Custom of shall not wage his Law upon Covenant for *London*. Tabling) *Sed non alloc'*, it is pleadable at any Place. This Covenant is allowable at Law, and the Words of the Statute are, That the Covenants shall become of such Effect and Efficacy, as if he had been at full Age at the Time of the Sealing the Indenture, and then he shall be bound in every Place within the Realm. The Court seemed to be of Opinion, That the Action was well brought. *More 138. Stanton's Case. 1 Raym. 60. and 1 Lev. 81. Mould and Wallis.*

Covenant against an Executor upon the Covenant of the Testator, to teach an Apprentice his Trade. It was moved, That this Covenant was Personal to the Testator, and binds not the Executors, but only binds the Master, during his Life, to teach him. But *per Cur'*, it binds the Executors also, and they ought to see the Apprentice taught his Trade; and if they are not of the Trade, they ought to assign him to another, who is of the Trade. *1 Lev. 177. Walker and Hull.*

## C H A P. XXXIV.

*Actions.*

Covenant was brought against Two, and the Writ was, *Quod teneat Conventionem*, and it was amended, though in an Original Writ. 2 *Vent.* 173. Coke and Romney.

**Unreasonable Bail.** The Writ was Damages 30000*l.* That the Party should not put in Bail. *Per Cur'*, it's a great Abuse, though in Covenant no Fine is due, nor in Debt: If the Party be committed, they will force the Plaintiff to take reasonable Bail, according to Direction; and if the Plaintiff declare of a less Sum, they will lay him by the Heels, and the Plaintiff ought to swear the probable Cause of Action to be of such Value. 1 *Keb.* 470. Sir J. Cutler's Case.

Action how often on Breach of a Covenant.

In Covenants perpetual, if they be once broken, and an Action of Covenant brought, and Recovery upon it, if they be afterwards broken, a *Scire fac'* shall be had upon the Judgment, and the Plaintiff need not to bring a new Writ of Covenant. Cr. El. p. 3. Swan's Case.

Covenant to pay 40*s.* per *Ann.* during 21 Years; he may have several Actions of Covenant for every Time it is behind, and so every Year a new Action. Godb. p. 12. 1 *Brownl.* 19, 20.

1 *Inst.* 292. To pay Money at 5 several Days, at the first Day Covenant lies after Failure.

If

If a Man grants Rent to another, payable at a certain Day, and covenants to pay the Rent accordingly ; if the Grantee after recover in an Action of Covenant for Non-Payment of the Rent, this shall be a Bar of any Action after for the Rent, for in the Action of Covenant he shall recover all the Rent in Damages. *1 Rob. Abr. 353.* Strong Action for the Rent. and Watts.

*J.* covenants within a Year to suffer a Common Recovery, and all the Terms are past without any Recovery suffered ; yet no Action lies upon that Covenant until the Year be fully expired, though the Terms being pass'd it is impossible to suffer any Recovery within the Year and Time prefix'd. *4 Leon.*

170.

*A.* covenants with one, his Heirs and Assigns, for Enjoyment, and this is touching an Estate of Inheritance. *Per Cur'*, the Execution being of the Testator, he cannot have Heir or Assignee of this Land, but the Damages shall be recovered by the Executor, though not named in the Covenant, for they represent the Person of the Testator. *2 Lev. 26. Lucy and Levington.* *1 Vent. 175.* *2 Keeble 831. Id. Casus.*

Lessee covenants with the Lessor, his Executors and Administrators, to repair, and leave in Repair, at the End of the Term ; and for not leaving in Repair at the End of the Term, the Heir brings the Action of Covenant, and good. It is a Covenant that runs with the Land, and shall go to the Heir, though not named. *5 Rep. Spencer's Case.* And it appears, the Intent was to have it continue after the Death of the Lessor, being with him and his Executors, and

If Grantee recover in Action of Debt for Rent, it is a Bar of another Action for the Rent.

Where the Heir shall have Covenant.

therefore it determines not by his Death.

*2 Lev. 92. Loughter and Williams's Case, in Sac'.*

*Who shall have Action of Covenant, or not.*

If Indenture of Charter-Party be made between one *A.* and others, Owners of the Ship called *E.* whereof *B.* is Master, of the one Part, and *C.* of the other Part; in which Indenture *A.* covenants with *C.* and *C.* covenants with *A.* and *B.* and binds them to *C.* and *B.* for Performance of Covenants in *600 l.* and the Conclusion of the Indenture is, [In Witness whereof, the Parties above-said have put their Hands and Seals]; and the said *B.* to the said Indenture, puts his Hand and Seal, and delivers it. In this Case, *B.* is not Party to the said Indenture; so that *B.* cannot release the Action brought upon this Indenture by *A.* for that this is an Indenture Reciprocal between Parties of the one Part, and Parties of the other Part; in which Case no Obligation, Covenant or Grant, may be made with any that is not Party to the Deed, but where the Deed indented is not reciprocal, but without the Words, [between, &c.] as *omnibus Christi fidelibus, &c.* there an Obligation, Covenant or Grant, may be made to divers several Persons. *Coke 2 Inst. 673. 2 Lev. 74. 3 Lev. 139.*

If Indenture of Charter-Party be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants, of the other Part, and there are several Covenants of the one Part, and of the other, and *A.* only seals the Indenture of the one Part, and *C.* and *D.* seal theirs, and *B.* seal all, then *C.* and *D.* are bound by the Indenture, and *B.* is bound by his Seal.

C. and D. of the other Part; but through the whole Indenture it is mentioned, That A. and B. covenant with C. and D. and C. and D. covenant with A. and B. In this Case, A. and B. may join in an Action against C. and D. upon this Indenture, for Breach of a Covenant in the Deed, although that B. never sealed the Deed, for he is Party to One, though he never did seal the Deed.

*2 Rol. Abr. Clement and Henly.*

O. C. seised in Fee of a Messuage, and possess'd of a Lease for divers Years yet enduring, let to the Defendant for 10 Years, and wherein the Defendant covenants to Repair, and by a Deed he granted to the Plaintiff the Reversion in Fee, and by another Deed the Reversion for Years. Now tho' he hath Two Reversions, the one in Fee, and the other for Years, granted by several Deeds, and at several Times, yet he may have one Action of Covenant. *Cro. Jac. 329. Pyot and the Lady St. John. 2 Bulst. 112. Id. Casus.*

If a Man demise Land to a Woman for Years, and the Lessor covenants with the Lessee to repair the Houses during the Term, the Wife takes Husband, and dies, the Husband shall have Action of Covenant, as well upon the Covenant in Law, on these Words, [Demise or Grant,] as upon express Covenant. *5 Rep. 17. a.*

The same Law is of a Tenant, *per Stat.* By Tenant, Merch' or Staple, or Elegit, of a Term, and by Statute or he to whom the Lease is sold, by force of any Elegit. Execution, shall have Action of Covenant

## The Law of Covenants.

in such Case as a Thing annexed to the Land, although they come to it by Act in Law. *Ibid.*

In London a Man shall have Covenant without Deed, by the Custom. *N. B.* 146.

**What Words  
amount to  
Debt or Co-  
ovenant.**

Debt on an Obligation: The Words of the Obligation were, [I am content to give to *W.* 10*l.* at *Michaelmas*, and 10*l.* at *Lady-Day*:] It's a good Obligation, and amounts to as much as I promise to pay; and an Action of Covenant lies upon it, as well as Debt, at the Election of the Plaintiff: And though the Action is 20*l.* and the Declaration is 10*l.* and 10*l.* at Two several Days, yet it's good enough, and the Declaration well, pursuant to it. *3 Leon.* 119.

Debt for 15*l.* 18*s.* 6*d.* and declares on a Deed, reciting, That divers Suits were between the Vicar of, &c. and the Plaintiff, touching a *Modus Decimandi*; which *Modus* concerns all the Parishioners. Defendant, a Parishioner, agrees, and promiseth, with the Plaintiff, to pay his proportionable Part of all Charges of the said Suit, and other Suits touching this Matter; and that the Plaintiff had expended 350*l.* and the Defendant's Share came to 15*l.* 18*s.* And whereof he had Notice, & *licet requisitus*, had not paid it. Upon *non est factum*, Verdict *pro Quer'*. It was moved in Arrest, that Debt lies not on this Agreement, it being not certain what the Sums to be paid shall be, but Covenant; but *per Cur'*, for when the Damages which were at first uncertain, are by Averment reduced to a Certainty, Debt lies as well as Covenant. *3 Leon.* 429. *Sanders and Mark.*

Oyer.

Oyer. Vide *Monstre des faits.*

In Action of Covenant, the Defendant demands no Oyer, but pleads, in *Articulis illis ultorius continuetur, &c.* which, *per Cur'*, is ill, and his shewing the Counter-Part is not sufficient, but the whole Indenture ought to be in Court. 1 Keb. 513. *Priestland versus Cooper.*

In Action of Debt, the Defendant pleaded it was for Performance of Covenants, and that he hath performed all, not shewing forth the Indenture. Plaintiff demurred. *Per Cur'*, he must set it forth, and gave this as a Rule in the Action depending. 1 Keb. 415. 1 Sid. 97. *Lewis and Bull.*

Note, In Debt on Bond, for Performance of an Award or Covenants; if Money be awarded or covenanted to be paid of Value, Special Bail is required: Otherwise, if it be to do any Act that is in it self uncertain, as to have Trees, common Bail is only required. 1 Keb. 450.

*In what Case one cannot have Action of Covenant, not being Party to the Deed.*

Debt on a Charter-Party, indented of Affreightment made by *Benly*, Master, and Partner of a Ship; by which he, by the Consent of *Cooker*, the other Part-Owner, let the Ship to the Defendants for a Voyage, and for which the Defendant covenants to pay such Sum to *Benly*, as Master; and covenants with the said *Benly*, and also with the said *Cooker*, to pay to *Cooker* 300*l.* and for

Non-

## The Law of Covenants.

Non-Payment, Cooker brings the Action. Defendant demands *Oyer* of the Indenture; which is entered thus, [This Indenture Charter-Party witnesseth, That *Benly*, Master, and Part-Owner of the Ship, with the Consent of *Cooker*, the other Part-Owner, let the Ship, and then the Covenant's *ut supra*;] and then the Defendant pleads, he only, and *Benly* were Parties, and sealed and delivered the Charter-Party, and the Plaintiff was no Party. Plaintiff demurs, for this is not an Indenture between the Parties, but all one as if a Deed-Poll; by which he may covenant with a Stranger, not being between *Benly* of the one Part, and the Defendant of the other Part; in which Case, none but who was Party might have brought an Action on the Deed: But here being as a Deed Poll, he may covenant with divers Persons to do several Acts, for which each one severally shall bring his Action. 2 Inst. 673. Of this Opinion was all the Court. 2 Lev. 74. *Cooker and Child.* Judgment pro Quer'. 3 Keeble 94. *Id. Casus.*

In some Cases a Stranger, to the Covenant, shall maintain an Action against the Covenantor.

Two Coparceners made Partition, and one covenanted to acquit the other of a Suit, occasioned by the Land so divided; the Covenantee aliened it: The Opinion in 1 Inst. 385. a. That the Alienee, who is a Stranger to the Covenant, shall maintain an Action against the Covenantor, because the Acquital runs with the Land.

When

## When the Action shall be brought.

Defendant by Bill sealed, promised and agreed to pay to the Plaintiff *Annuatim 5 l.* for 5 Years, at Two Payments in the Year; On several Covenant lies, if it be not paid the first half Payments. Year; *aliter*, in Bill of Debt. 3 Lev. 383.  
*March and Freeman.*

*A.* covenants with *B.* to pay him 100 l. at 5 several Days; after the first Default, Action of Covenant lies, for they are several in their Nature. 1 Inst. 292. b. 1 Cro. 807.

And there, if he bring Action after the first Breach, he shall have Judgment and Damages for the said Breach; and at another Time, whensoever there shall be another Breach, he shall have a *Scire fac'* on the said Judgment. Br. *Sci fa'*, 218.

If *A.* recover by Judgment upon a Composition, which is Executory from Time to Time, there he shall have a *Fieri fac'* of that which is incurred within the Year, and a *Sci' fac'* after. Cytoft, &c. 23 H. 8. Br. *Exec'*, 119.

In Case of Covenant, for every Breach he shall have a new Action, as was held, *per Cur'*, in *Taylor and Foster's Case*, 43 Eliz. B. R. and in *Hugh's Case*, Rep. 11, 12.

*In what special Cases Covenant lies.*

Action of Covenant was brought, declaring upon a Deed, by which the Defendant *assignavit & transposuit* all the Money that should be allowed by any Order of a foreign State to come to him in lieu of his Share in a foreign Ship ; It was moved, that the Action of Covenant would not lie, because it's neither an express nor an implied Covenant : *Hales*, it is a good Covenant against the Party himself. If I will make a Lease for Years, reserving Rent, to a Stranger, Action of Covenant will lie by the Party, for to pay the Rent to a Stranger ; and if it were an Assignment for Maintenance , it ought to be averred it is a Covenant ; it is all one as if he had covenanted, that he should have all the Money that he should receive for his Loss in such a Ship, *1 Mod. Rep. 113. Deering and Farrington, Judgment pro Quer, 3 Kebble 304. id. Casus.*

Good Covenant against the Party himself.

Assignment for Maintenance.

On a Concessit in a Fine of a Term against a Feme Covert.

No Action of Debt, because it sounds in Covenant.

It lies upon a Concessit of a Term in a Fine, altho' there is no Deed ; and this too against a Feme Covert, *1 Sid. 466. Wotton and Heale, 1 Mod. 66. 1 Lev. 301. 2 Sand. 177. & 2 Keb. 684. id. Casus.*

If C. recovers 10 l. against A. and B. comes to C. and saith, That if he will release the 10 l. to A. that he will be his Debtor ; and he accordingly released the 10 l. to A. yet no Action of Debt lies, because it sounds in Covenant, *9 H. 5. 14.*

In Covenant the Plaintiff declares, upon a Writing of the Defendant's Testator, acknowledging himself to be accountable to the Plaintiff for whatever Money the Plaintiff

tiff should charge upon *J. S.* payable to Sir *Tho. Viner*: *Per Cur'*, it lies well, being against Executors; and had it been against the Party himself, &c. no Notice is given Notice by the Plaintiff to *J. S.* who upon such Bills was to pay to Sir *Tho. Viner*, and it's not necessary, *i Keb. 155.* *i Lev. 47.* *Brice and Curr.*

Whereas the Defendant recovered against him *7 l. 10 s.* and for Costs and Damages, and upon that Judgment, the Plaintiff paid to him *7 l.* and the Defendant made unto him a Release of that Judgment, and by his Deed covenanted, that he would withdraw all Process of Execution for that Debt; that the Defendant intending unjustly to vex him against this Release, and against his Promise in the said Writing, sued a *Co' sa'*, by which he was arrested and detained in Prison. Decla- Where ration is ill, he ought to have had an Action Action of of Covenant, and not an *Assumpsit*, *Cr. Fac. 505. Bennus and E. Guildly, Hob. 284. Green and Harrington.* *Covenant lies, and not an Assumpsit.*

To *Scire fac'* on a Judgment, Defendant pleads, That before the Judgment and hanging the Suit, the Plaintiff covenanted with him by the Deed now shewed, That if he obtained Judgment, and the Defendant on such a Day paid unto him *100 l.* that he would not sue Execution, and the Judgment should be void; and pleads, that he had paid the *100 l.* accordingly, and demanded Judgment. Plaintiff demurred. *Per Cur'*, it is not Where Re- any Plea, for he cannot make a Defeasance medy must of a Judgment before it be given, and they be by Way said his Remedy is only by Writ of Covenant of Covenant, upon his Indenture, *Cr. El. 837. Gage and Sburland.* and not by Plea.

Debt

## The Law of Covenants.

Debt was brought upon this Deed ; It is agreed, that C. shall pay unto P. 700*l.* for *J. S.* his House and Lands in *B.* C. may have Covenant against P. if he doth not convey the Lands, *1 Sid.* 423. *Pordage and Cole,* see *Ray.* 183. *1 Lev.* 274. *1 Sanders* 319. and *2 Keeble* 542.

**Against the King's Lessee.** A Writ of Covenant lies against the King's Lessee upon a Patent of the King, tho' there is not any Counterpart sealed by the Lessee, who is to be charged ; Sir *John Brett* and *Cumberland*, Lessee by Letters Patents, is bound to Covenants, and so is his Assignee, *1 Roll. Rep.* 359. *3 Bulst.* 163. *2 Cro.* 399.

A Man made a Lease for Years, with Exception of divers Things, and that the Lessee shall have *conveniens Lignum non succidendo seu vendendo Arbores* ; Lessee cuts down Trees, Action of Covenant lies by the Lessor, for it's a Covenant on Part of the Lessee, because this Law giveth him reasonable Estovers, and by this Covenant he abridgeth his Privilege, *Marsh.* p. 9.

A Lease by Estoppel is a good Lease to ground this Action upon Eviction, and to traverse that he was not possessed by Virtue of a Lease, is no Plea against the Lease by Indenture, which is an Estoppel without shewing a particular Cause, *Cr. Fac.* 73. *Stiles and Herring.* Vide *Vaughan* 118. *Hayns and Bickerstaff.*

**What shall be said a Covenant on the Part of the Lessee.**

**Estoppel.**

**Plead.**

**A Thing to be done at the Time of the Covenant, and after prohibited per Stat.**

A Covenant upon a Charterparty for the Freight of a Ship ; The Defendant pleaded, that the Ship was loaded with *French Goods*, which *French Goods* were prohibited by Law to be imported. On Demurrer, ruled no Plea, for the Court were all of Opinion, If the Thing to be done was lawful, at the Time when

when the Defendant did enter into the Covenant, tho' it was afterward prohibited by Act of Parliament, yet the Covenant is binding, 3 Mod. 39. *Brasen versus Deane.*

In Covenant the Plaintiff declared, That the Defendant demised to him an House, with the Use of a Pump, and he suffered it to be so out of Repair, that it became useless, and covenants, that he shall enjoy *dimissa Praemissa*, and assigns a Breach that he suffered *antliam præd' esse fractam & totalit' spoliat'*. Defendant demurs. *Keling, Mereton, and Rainsford*, held, that the Action did lie, the Use of the Pump being Part of the Thing demised; which Words make a Covenant, as in 4 Rep. *Nokes's Case*, 5 Rep. *Spencer's Case*.

If a Man let an House, together with the Estovers to be taken of the Wood of the Lessor, and afterwards the Wood is stubbed up, Covenant lies for the Lessee. If a Parson makes a Lease, and then resigns, he is liable to covenant; and in this Case the Lessee would be at a Mischief, for he should be a Trespasser to enter and repair it, and this is an Ouster as much as may be, where the Lessee is possess'd. *Twisden fortiter contra*, he may have Action on his Case, and so Remedy for his Damages; and he said he might enter and repair, *quando aliquis concedit*, &c. He said he never met with a Case where Covenant would lie but upon an actual Ouster, either by a Stranger, who had an Eigne Title, or by the Lessor himself: This is Nonfeasance, and so he differenced it from the Case of Estovers, which was an actual Tort. In Covenant upon an Ouster of a Term, if it be not incurred, Judgment must be to recover the Term it self, *Fitzb. Na. Br. 145.*

which

## The Law of Covenants.

which cannot be in this Case, for the Sheriff cannot put him into the Use of a Pump, *1 Ventr. 26. 44. Pomfret and Rycroft; Judgment pro Quer. 1 Sand. 321. 1 Sid. 429. 2 Keeble 505. id. Casus.*

*In what Cases Covenant doth not lie.*

**In respect of  
the Words.**

**Covenant not  
broken, be-  
cause out of  
the Words.**

**Where  
Action of Co-  
venant lies  
not, but an  
Action on the  
Case.**

One made a Lease for Six Years; and Lessor covenants, That if he were disposed to lease the said Lands after the Expiration of the said Term of Six Years, that the Lessee should have the Refusal of it. Lessor within the Six Years makes a Lease thereof to J. S. for 21 Years, to commence presently. *Per Cur'*, the Covenant is not broken, because it's out of the Words of the Covenant, *Godb. 335. 2 Rol. Rep. 332. Walter and Mountague.*

One covenants to cause a Statute to be cancelled, and the same to be vacated upon the Payment of 10*l.* before such a Day, and at the Day he tendered the Statute to be cancelled, &c. but before that Time he had sued Execution on the Statute. The suing of Execution before the Day is a Breach of Covenant, and an Action lies, for after Execution he cannot deliver up the Statute in the same Plight; yet an Action of Covenant doth not lie in this Case, but an Action on the Case, in as much as the Words before are Words of Defeasance, and in the Present Tense, and a present Thing to be done; as if a Covenant be to stand, seised to Uses, or that one shall enjoy such a Deed, no Action of Covenant lies, *1 Sid. p. 48. Robinson and Amps. 1 Keb. 103, 118. Raymond. 25.*

If a Man covenant to grant such Estate to his Wife, or to leave her worth so much Money if she survive him ; if she dies before him the Covenant is not broken, tho' he did not make such Grant, 2 Mod. 201.

Covenant to grant such Estate to his Wife, and she dies before him.

Covenant upon the Receipt of 100 l. to give Acquittance, and to enter into Bond, &c. no Covenant lies if the Defendant refuse to receive it, for it is at his Election, *Stiles Rep.* 481. *London and Craven.*

Tenant for Life lets the Lands for Years by Indenture, thus : *I give, grant, bargain, and sell my Interest in such Lands for Twenty Years, to hold the same in such Manner and Form as I my self held the same.* Tenant for Life died within the Term, he in the Reversion entered, and Lessee brought Action of Covenant ; it lies not, for the Warranty in Law cannot extend to the Plaintiff, he being not Lessee, but Assignee ; but if it did, yet now tends to As- it is determined with the Estate of the Te- signee. *nant pro Life* ; so if Tenant in Tail make such a Lease and die without Issue, 1 *Leom.* 179. *Cheyny and Langly*, 3 *Cro.* 157.

Dame *Say* let an House, and Barn, and Land to *Cowper* for Years, rendering Rent ; *Cowper* by Deed assigns his Term to *Pollard* ; *Pollard* covenants to save the said *Cowper* harmless of all Covenants, Agreements, and Payments, in the said first Indenture of Lease : *Pollard* lets for a Year the said Barn to *Cowper*, who put Hay in it, and after grants the Barn and Hay to one *Barber*, and covenanted to warrant it. Dame *Say* distrains tends not to the Hay. *Cowper* brought Covenant. *Per a lawful Di- cur*, the Action lies not. Hay in a Barn cannot be distrained for Rent no more than Shocks of Corn ; but if they were in a Cart,

## The Law of Covenants.

*aliter*; and if the Distress is unlawful, the Covenant shall not extend to it, for it extends not to tortious Incumbrances, *Jones Rep.* 197. *Cowper and Pollard.*

Debt on Bond for Performance of all Covenants, Payments, &c. in Indenture of Lease, wherein the Defendant, for and in Consideration of 400*l.* lent him by the Plaintiff, granted the Land to him for Forty nine Years, if G. so long live, provided if he pay 60*l.* per *Annum* quarterly, during the Life of C. or shall within Two Years after his Death pay the 400*l.* to the Plaintiff, then the Indenture to be void, and a Clause of Re-entry for Non-payment. Defendant pleads Performance; Breach assigned was, That 30*l.* for half a Year was not paid at such a Time, during the Life of G. Defendant demurs, for that the Breach was not well assigned, because there is no Covenant to pay the Money, only by a Clause Liberty is given to re-enter for Non-payment. *Per Cur'*, this Action will not lie, it being only a Proviso, and there being no express Covenant, and therefore no Breach can be assigned, *2 Mod.* 36.

Covenant lies  
not on Words  
of Defea-  
tance, or in  
the present  
Tense.

Where the Words are Words of Defeasance, and in the present Tense, and a present Thing to be done, Covenant lies not, but Action on the Case; as Covenant to stand seised to an Use, or that one shall enjoy such a Deed, *1 Sid.* 48. *Robinson and Amots*, for this Action will never lie upon any Covenant, but upon such a Covenant as is to do a Thing hereafter, or that a Thing hath heretofore been done, and not when it is for a Thing present; as when A. doth covenant with B. that his black Horse shall be for

for ever after the Horse of B. This is no good Covenant to give the Horse to B. or to give him Action of Covenant for him, but A. may keep him still notwithstanding ; but there is a Difference : If the Covenant be future, as where one doth covenant with another, that, in Consideration of a Marriage, his Lands shall descend or remain to his Son and Heir apparent, and the Heirs of his Body on the Body of his Wife ; if the Uses do not so rise, the Covenantee may have a Writ of Covenant against the Covenantor, *Pl. 307, 308.* But if the Covenant be *in praesenti*, as that a Man and his Heirs from henceforth shall stand and be seised to such and such Uses, and the Uses will not rise by Law, in such Case no Action will lie upon this Covenant, for this Action will never lie upon any Covenant, but upon such a Covenant as is either to do a Thing hereafter, or that a Thing is or hath heretofore been done.

X 2 CHAP.

## C H A P. XXXV.

*Covenant against whom.**Against Assignee.* Vid. *Assignment, Devant, & infra.**Against Infant.* Vid. *Apprentices.**Against Under-Tenants.* Vid. *Assignment.**Against a Feme Covert upon a Concessit of a Fine.**Against Lessee of the King, tho' no Counterpart.**Diversity between original Covenant by the King, and where Covenants are vested in the King as a publick Trustee.**Against a Corporation.*

**I**t lies upon [Concessit] of a Term in a Fine, altho' there is no Deed, and this too against a Feme Covert, 1 Sid. 466. Wotton and Hele. Dev'.

It lies against Lessee of the King by Letters Patents, tho' there is not any Counterpart sealed by the Lessee, Sir John Brett and Cumberland's Case, 2 Rol. Rep. 359. Dev'.

Upon original Covenant by the King, there Relief lies upon and against all that claim under him, because it was originally by the King, in the King by his own Contract; but where Covenants are vested in the King as a publick Trustee, no Remedy lies against him, as there does upon original Covenant by the King, upon the Behalf, and for the Use and Benefit of another Person, Hardr. 373. Vid. p. 117.

It lies against a Corporation. If a Corporation covenant not to take Toll, and their common Officer appointed for that Purpose doth take it, this is a Breach of the Covenant, 43 Ed. 3. 17.

If a Feoffment or Lease be made to Two, or to a Man and his Wife, and there are divers Covenants in the Deed to be performed on the Part of the Feoffees or Lessees, and one of them doth not seal, or the Wife doth not seal during the Coverture, and he or she that doth not seal, doth notwithstanding accept of the Estate, and occupy the Lands conveyed or demised : In these Cases, as touching all inherent Covenants as for Payment of Rent, and the Necessaries thereof, as Clauses of Distress of Re-entry, of *Nomine Pena*, Reparations, and the like, they are bound by the Covenants as much as if they do seal the Deed. So,

If a Lease be made to *A.* for Years, or Life, the Remainder to *J. S.* in Fee, and there is a Rent reserved, or there be divers Covenants on the Parts of the Grantees, and *J. S.* doth never seal the Deed or Counterpart ; yet if in this Case he accept the Estate after the Death of *A.* he must pay the Rent, and perform all the Covenants that are inherent, *Inst. 231.*

If an Indenture be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and therein there is a Lease made by *A.* to *B.* and *C.* on certain Condition, and *B.* and *C.* are bound to *A.* by the Indenture in 20*l.* to perform the Condition, and *B.* only doth seal the Deed, and not *C.* yet in this Case, if *C.* accept of the Estate, he is bound by the Covenants, and one of them cannot be sued without the other, *Transit terra cum onere. Et qui sentit commodum, &c.*

If a Man covenant for him and his Heirs, to do any Thing whatsoever, hereby his Heirs are bound, *5 Rep. 17.*

## The Law of Covenants.

Covenant  
against the  
Heir.

Baron and  
Feme cove-  
nant not to  
commit  
Waste ; Ba-  
ron dies, no  
Action lies  
against her.  
For what  
Things it  
lies against  
her.

If the Lessee for Years be ousted by any other than the Heir himself, no Action of Covenant will lie against the Heir, or be ousted from any elder Title by and from the Lessor.

If I make a Lease to Baron and Feme, and they covenant to do no Waste, or to repair Houses, and the Husband dies, and the Wife survives and holdeth it ; if the Wife commit Waste, or do not repair the Houses, no Action lies against her ; but in such Case the Wife is tied to pay Rent, or to perform a Condition made on the Part of the Lessor, but not to observe or perform the Covenant of the Lessee, *I Brownl. 3. 34.*

## CHAP.

C H A P. XXXVI.

*Joiner in Action of Covenant, or not. Vid.  
Covenant, joint and several.*

**T**H E Defendant covenanted, that he would not agree for taking the Farm of the Excise of Beer and Ale for the County of York, without the Consent of the Plaintiff and another ; and the Plaintiff alone brought this Action of Covenant, and assigns for Breach, the Defendant's agreeing for the said Excise without his Consent, and had Verdict. *Per Cur'*, here was no joint Interest, *Several Inter-*  
*ests.* but that each of the Covenantees might maintain an Action for his particular Damages, otherwise one of them might be reme-  
diless : For suppose one of them had given his Consent that the Defendant should farm the Excise, and had secretly received some Recompence for so doing, is it reasonable that the other should lose his Remedy, who never did consent ? *2 Mod. 82. Wilkinson and Floyd.* Vide this Case, *3 Keb. 638.*

Two Tenants in Common bring Covenant against Lessee for Years, for not repairing the Thing demised ; and whether they ought to sever or join, was the Question. And *per Cur'*, they ought to join, because it is a personal Action, *Litt. Sect. 311,* *312.* tho' it favour of the Realty, i. e. tho' the Thing of which, (*viz.*) the House is in the Realty, yet the Action is not so ; it is a Covenant and concerns the Profits, and they

Tenants in  
Common,  
where must  
join in  
Covenant.

## The Law of Covenants.

must join, *Ray.* 80. *Kitchin* and *Knight* versus *Buckley*, Vid. 1 *Lev.* 109. *mesme Case*, 1 *Keb.* 565, 572. *mesme Case*.

Tenants in  
Common of  
a Reversion  
join.

A Lease is made for Years, and Lessee covenants to repair, after which Lessor sells the Reversion of one Part to A. and of the other Part to B. and they Two join in Action of Covenant for not repairing of the House: It was moved in Arrest of Judgment, That this Action sounds in the Realty, and therefore they ought not to join, but ought to sever. 2. That this Action of Covenant does not lie for the Assignees in this Case, because the Lessee only covenants with the Lessor and his Heirs, and not with his Assignees, as the Plaintiff's are in this Case. But *per Cur'*, As for the first Exception, *Littleton's Text* warrants that they may join in Action of Covenant, because it's a Personal Action. 3. Assignee may maintain Covenant in this Case, without being named, 1 *Sid.* 157. *Kitchin and Compton*, 1 *Lev.* 109.

Covenant  
with Three,  
& quilibet  
corum.

5 Rep. 18. b.

Joint Action  
on Two Re-  
versions.

Indenture Tripartite between Three, A. was one of them, and he covenanted with them & quilibet corum; and the Covenant was, That the Land he had aliened to one of them was free from all Incumbrances, and he to whom the Limitation of the Land was, brought a Writ of Covenant sole. *Per Cur'*, Covenant did not lie by one of them only, but ought to be brought by both, notwithstanding, 6 *Ed.* 2. *Br. Covenant* 49. judged in the Exchequer-Chamber, 2 *Leon.* p. 47. 3 *Leon.* 160. *mesme Case*, *Beckworth's Case*.

The Plaintiff had the Reversion of Two Houses, one in Fee, and the other for Years, with Covenant for Reparation of both Houses, and he shall have a Joint Action for both,

both, *Brownl. p. 20. Pyot versus Lord St. John, Cr. Jac. 329. Dev.*

Indenture of Covenants between Two of the one Part, and one *Yate* of the other Part ; and amongst other Covenants, one was : It is agreed between the Parties, That *Yate* shall enter into a Bond to pay *Rolls* (who was one of the Two of the other Part) 160*l.* by such a Day, which was not paid : *Rolls* dies, and *Rolls* the Plaintiff takes Administration, and brought Covenant against *Yate*, for Non-payment of the 160*l.* to *Rolls* in his Lifetime. *Per Cur'*, it doth not lie, for tho' the Monies were to be paid to *Rolls* who is dead, yet he which survives, and is Party to the Indenture, ought to have the Covenant ; as in Bond made to Three, to pay Money to one of them, all ought to join in the Suit, for they are all as one Obligee ; and if he which ought to have the Money dies, the other Two ought to sue, tho' they have no Interest in the Money, *tel. 177. Rolls and Yate. Convent' & agreeat' est* between the Parties ; it is a Joint Covenant, and they ought to join in Covenant, *5 Rep. 19. Slingby's Case.*

Survivor  
ought to  
have the Co-  
venant, and  
not he to  
whom the  
Money is to  
be paid.

If Indentures of Charterparty be made between *A.* and *B.* Owners of a Ship of the one Part, and *C.* and *D.* Merchants of the other Part, and there are several Covenants on the one Part and of the other ; and *A.* only seals the Indenture of the one Part, and *C.* and *D.* on the other Part ; but in all the Indenture it is mentioned, that *A.* and *B.* covenant with *C.* and *D.* and *C.* and *D.* covenant with *A.* and *B.* In this Case *A.* and *B.* may join in Action of Covenant against *C.* and *D.* on this Indenture for Breach of Covenant,

One who is  
Party to the  
Deed, tho' he  
never sealed,  
may join in  
Action of  
Covenant.

*tho'*

tho' *B.* never sealed the Deed, for he is Party to the Deed, and *C.* and *D.* had sealed the other Part to *B.* as well as to *A.* upon which the Action is brought, 2 *Rol. Abr.* 22. *Clement and Henly.*

Action of Covenant not to receive any Sums above 100*l.* but that all such Sums should be paid to *Hinton*; this was an Indenture Tripartite, and one Breach is assigned in receiving Money on Brandy, Wines, (Prize) on the Joint Stock, for which the other should have joined; as is 5 *Rep.* 18. to which the Court agreed, albeit there were a Covenant in the Deed, that there should be no Survivorship, and the Third Party is dead. It was objected, the Plaintiff is an Administrator of one of the Parties, and so cannot join; also this is no Joint Covenant to them first, but only with either of them: But by *Keling C. J.* the Exposition must be on the whole Deed, which expressly mentions a Joint Stock, and the Trade Joint, *per Cur'*, 2 *Keb.* 338, 339, 347. *Eccleston and Clypsham*, & 1 *Sanders* 153.

Joinder in Action, because of a Joint Stock, and a Joint Trade.

Reversion granted to Baron and Feme, Baron Sole brings the Action.

Queen Elizabeth makes a Lease for Thirty one Years, of Mills, and grants the Reversion to Baron and Feme; Lessee covenants to repair, Baron Sole brings the Action of Covenant, and good; because it is good at Common Law, and it is not brought upon the Stat. 22 H. 8. c. 34. It is a Covenant for Reparations, and the Assignee shall have Advantage at Common Law, 5 *Rep.* *Spencer's Case*, 1 *Rol. Rep.* 359. *Brett and Cumberland*, 2 *Rol. Rep.* 63. 2 *Cro.* 399. *Cest C. Dev.*

In

In Action of Covenant against Two Plaintiff jointly, on Covenant made jointly and severally ; if the Plaintiff hath Judgment against one by Default, and be barred against the other ; on Plea pleaded, he is barred as to both, and so in all Actions where of Necessity they must be joined, as in Debt, Detinue : *Aliter in Trespass.* One Defendant having pleaded Covenants performed and found for him, here it appears the Plaintiff hath no Cause of Action against any, 1 Keb. 284. 1 Sid. 76. *Boulter against Ford and Harris,* 1 Lev. 154.

hath Judg-  
ment against  
one by De-  
fault, and is  
barred against  
the other on  
Plea ; he is  
barred as to  
both, and  
why.

In Action of Covenant against Two Judgment jointly, on Covenant made jointly and severally ; If the Plaintiff hath Judgment against one by Default, and be barred against the other ; on Plea pleaded he is barred as to both. *March 103. Pl. 126. Stiles 5. Pl. 9.* 2 Cr. 134. and so in all Actions where of Necessity they must be joined, as in Debt, Detinue : *Contra, in Trespass, or the like.* And tho' the Labour to build the House were several, yet the Matter being contained in the Deed, is joint ; but when the Joinder is only on *delictum*, as Two join in Service of F. S. if one do not, the Plaintiff may recover against him alone. By *Foster*, as this Case is the one, Defendant having pleaded Covenants, and found for him, here it appears the Plaintiff has no Cause of Action against any ; which the Court agreed also, *Stiles 57. Pl. 124.* In a Writ of Conspiracy against Two, one confesseth, and the other pleads ; and it is found he did not conspire, which is found for him, both are hereby discharged, which the Court and Bar agreed, 1 Keb. 284. 1 Sid. 76. *Boulter against Ford and Harris.*

## C H A P. XXXVII.

*Where the Action of Covenant shall be laid or brought. Vid. Trial.*

By Privies in Contract.

A Special local Breach.

THE Action of Covenant being brought by the Parties that are privy in the first Contract, it's in the Plaintiff's Election to bring the Action where the Land lies, or where the Covenant was made; but when Issue is joined on a Special local Breach, the *Venire* must be of that Place according to the Issue, altho' the Plaintiff hath Liberty to lay his Action where he will; as *1 Sid. 157. Gilbert and Martin, & 1 Lev. 114.* Covenant on Lease in *O. in Com' Hamp'* of an House in *B. in Berks*, and Issue taken on *non infregit conventionem*, and the *Venire* is from *O.* it's ill: so *Cr. Jac. 446.* Breach for not repairing cannot be laid where the Lease was made, but where the Land lies; also this is a special Tort, and not grounded on the Contract: And by the Rules of the Court, the *Venire fac'* shall be special to the Place of the Breach, and not where the Action is, unless specially drawn to another Place by Plea.

Lessee for Years of Lands in *Lincolnshire*, rendring Rent, the Lessor grants and assigns the Reversion to the Plaintiff, and he brings Covenant in *B. R.* and lays his Action in *London*, and assigns a Breach in Non-Payment of the Rent. The Defendant Lessee pleads he surrendered, and found against him in *London*. *Per Cur'*, The Action is well brought, because the *Stat. 32 H. 8. c. 34.* puts the

the Assignee of the Reversion in the same Plight and Stead that the Lessor himself was as to the Action of Covenant; and it is clear Diversify be-  
tween Debt  
for Rent and  
Covenant for  
Rent, as to  
if it had been Debt for Rent brought in a the Visne.  
foreign County, it had been ill, because this was annexed to the Reversion at the Common Law, and to be brought only where the Land lies, and not elsewhere without Personal Contract; but the Reason of Personal Contract is not extended to the Case of Covenant, but these by the Statute are transfer- *Stat. 32 H. 8.*  
*z. 34. explain*  
red as amply as the King might transfer any Thing in Action: And therefore in *Kitchin ned.*  
and *Buckley's Case*, 1 Sid. 401, 402. where in Covenant it appears, that one Plaintiff had one Moiety of the Reversion, and the other Plaintiff the other Moiety, the Action is well brought; but in Debt they may not join. Covenant in *London* for not repairing Hedges, and not plowing Land in *Com' Hartford*, and upon *Nil dicit*, a Writ awarded to the Sheriffs of *London*, to enquire of Damages, and Enquiry of Damages where the Dead is made. not to the Sheriff of *Hartfordshire*, and well enough, because the Covenant is founded upon a Writing made in *London*, Cr. *Jac. 142.* *Smith and Batten.*

Alleging the Breach in another County shall not remove the Action, 2 Sid. 118. *Dixon and Williams.*

But Covenant was brought in *London*, supposing the Place of Demise *apud Parochiam Sanctæ Mariæ de Bow in Lond'*, of a Messuage in *D.* in *Com' Surrey*, and thereupon a Covenant to repair the Houses, and alledgedeth, that *apud Lond' in Paroch'*, &c. he permitted the

the Houses to decay. Plaintiff demurs on a Vicious Bar pleaded, and it was shewed in Breach Local. Exception to the Count, that this Breach is of a Matter Local, and not Transitory, and is not in this Case well assigned, and of that Opinion was the Court; and the Plaintiff discontinued his Suit, and began *De novo*, Cr. Fac. 446. *Sliers and Bretton*, 1 Lev. 114. *Gilbert and Martin*, yet see 3 Lev. 394. *Huni's Case*.

*Stat. 32 H. 8.  
c. 34. explai-  
ned.*

*Assignment  
of Action,  
by Virtue of  
the Statute of  
32 H. 8. and  
Assignment of  
Debt, by  
Virtue of the  
Statute of  
Bankrupts.*

Grantee of Reversion brought a Writ of Covenant against the Lessee for Years for Non-payment of Rent; The Question is, Whether it ought to be laid where the Lease is alledged to be made, or where the Land lies? *Stat. 32 H. 8. c. 34.* which gives the Action of Covenant to the Assignee of the Reversion, saith, that they shall have such Actions in like Manner as the Lessors should have had. Now if it had been brought by the Lessor it had been Transitory, and so in Case of Assignment by Commissioners of Bankrupts, the Assignee of the Commissioners shall bring Debt, as the First Creditor should have done: But on the other Side it was said, that Statute shall not be intended to assign it as a bare Thing in Action, but to knit it to the Reversion, and the same Remedy is the same Remedy in Substance; and in Case of the Bankrupt's Debt the Contract is only assigned, *Ventr. p. 10. Nursye, and Hall,* 1 Lev. 259. 1 Sid. 401. & 1 Sand. 237.

C H A P.

C H A P. XXXVIII.

*Who shall have Covenants.*

T W O Coparceners made Partition, and the one covenanted to acquit the other of a Suit occasioned by the Land so divided. Covenantee aliened. *Per Coke*, the Alienee, who is a Stranger to the Covenant, shall maintain an Action against the Covenantor, because the Acquittal runs with the Land, 4 Mod. 75.

Lease by a Parson and *A.* and *B.* Churchwardens of St. Dunstans, and covenant not to build on the Lands let; Breach assigned in building an House of Office. Judgment *per Default pro Quer'*, but stayed, because they do not alledge a Custom to Lease as a Corporation, and they shall not be intended a Corporation, nor averred that they were Church-wardens at the Time of the Lease, 3 Keb. 811. *Sherlock's Case*.

Covenant made to Baron and Feme, the Husband alone may bring the Action, 2 Mod. 217. *Beaver and Laine*.

Executors and Administrators shall take Advantage of all inherent Covenants made with the Deceased, altho' they are not expressly named; as if *A.* covenant with *B.* (not naming the Executor or Administrator of *B.*) to do a Thing to *B.* or for him, and it be not done, and *B.* die, his Executor or Administrator may have Action of Covenant; so if *A.* covenant with *B.* to pay to *B.* £ l. at Easter following, and do not say, [Or

to his Executors, or Administrators ;] if *B.* dies before *Easter*, his Executors or Administrators may have Action of Covenant, or of Debt, if the *5 l.* be not paid to them at *Easter*, *5 Rep. 17. Dier 112. 271. Hob. 145.*

**Corporation.**

Action of Covenant lies for one Corporation against another.

**Estoppel.**

If Lessee for Years by Estoppel grant over his Term, the Assignee shall not have Covenant, because he had nothing in the Land but only an Estoppel.

**Heirs.**

If a Feoffment be made in Fee, and the Feoffor covenants to warrant the Land to the Feoffee and his Heirs, the Heir of the Feoffee shall take Advantage of this, *Dier 338.*

**Heirs, where  
to bring the  
Action.**

If *A. B.* and *C.* have Lands in Coparceny, and they purchase other Lands in Fee, and they covenant each to other, his Heirs and Assigns, to make such Conveyance to the Heir of him that dies first of a Third Part, as he shall devise; in this Case, the Heir, and not the Executor, shall take Advantage of the Covenant, *Dier 337, 338.*

*Baron*

Baron and Feme.

A Reversion is granted to Baron and Feme, and to the Heirs of the Husband, and after a Covenant is broken by the Lessee : Baron Sole may bring the Action of Covenant, where Damages sole are to be recovered, there the Husband only shall have the Action, *1 Rol. Rep. 359. Bret and Comberland, 1 Rol. Abr. 348. contra, 2 Mod. 217.*

Lease for Years to Baron and Feme, the Lessor ousts them ; they may join in Covenant, because after the Death of the Baron she shall have the Term, if he grants it not over, *Pl. II. upon the Covenant in Law, 1 Rep. 17. Dier 257.*

Where Baron and Feme must join in the Action as Assignees, *Jones 406. Midlemore and Goodale, & 1 Cr. Car. 505.*

Action of Covenant lies against a Feme upon a Warranty by her and her Husband, annexed to an Estate for Years in a Fine, *2 Sand. 180. after the Baron's Death, and when Warranty is annexed to an Estate for Years, in a Fine, it is only a Covenant for Damages in the Personal Lien.*

Y

Covenant

*Covenant brought by Executors, and where by the Heir.*

By Common Law, Executor (although he is not named) shall have Action of Covenant in all Cases, because he is Privy, and *Quodammodo Party*, for he represents the Person of the Testator. *I Inst. 208. b.* and more than the Heir. *Ib. 209. a.*

And this upon a Covenant in Fact, or a Covenant in Law.

And upon Covenant inherent that concerns the Land, and upon a collateral Covenant, and upon a Personal Covenant, Executors shall have Action of Covenant, for Breach of a Covenant made to the Testator. *Regist. 165. Br. Exec' 161.*

Executors shall have a Covenant, on a Covenant to the Testator, for a Personal Thing. *F. N. B. 145. d.*

Upon Covenant, That my Executors shall pay 10*l.* Debt, doth not lie against them, because the Testator was not charged, but Covenant lies there: But if Covenant to pay to you 10*l.* Debt lies against me, *per Cur' M. 32 & 33 Eliz.* and in *Perton and Austin's Case, P. 33 Eliz.*

If *A.* covenant with *B.* to pay to him 1000*l.* at *Michaelmas*, and does not say to his Executors, *A.* dies before *Michaelmas*, his Executor may have Action of Covenant against *B.* for the said 1000*l.* as is admitted in *Dier 112 b.*

Executors of an Assignee shall have Action of Covenant, for the same Right which was in the Testator, comes to his Executors. *S. Rep. 17. b.*

Bond made to one and his Heirs, his Executor, and not his Heir, shall have Debt upon it. F. N. B. 120.

The same Law of Administrators as Executors.

Where the Heir shall take Advantage of this Covenant.

If A. B. and C. have Lands in Parcenary, and purchase other Lands in Fee, and they covenant each to the other, and his Heirs and Assigns, to make such Conveyance to the Heirs of him who shall die first, of a Third Part as he shall devise here, the Heir, and not the Executor, shall take Advantage of this Covenant. 5 Rep. 17.

Action of Covenant was brought by A. Executor of B. against C. upon Articles of Covenant, upon a Deed made between B. and C. in which the Plaintiff declares upon the Deed, and shews the Deed at large; in which is recited, concerning the Sum of 2000*l.* agreed to be paid by the said C. for Monies before received of the Lady D. P. Wife of the said B. it is agreed by the said Articles between the said Parties, That there were remaining in the Hands of the said C. of the said Sum of 2000*l.* the Sum of 1000*l.* over divers particular Sums disbursed by him to several Persons therein named, by the Assent of B. and then B. covenants, That the said C. shall be saved harmless for the said Monies remaining in his Hands, touching a Suit in the Exchequer, and then C. covenants with B. Quod pro tam longo tempore quali dicta Sum' 1000*l.* remanceret in manibus dicti C. ipse solueret, seu solvi causaret dicto B. annuatim,

Saving harm-  
less, touching  
a Suit in the  
Exchequer.

Covenant to  
pay Interest.

*C. quolibet anno Summam 100 l. at several Feasts, by equal Portions, half Yearly: The first Payment to commence at Michaelmas after, and after B. to whom the 100 l. is to be paid, dies. It seems that the said 100 l. shall be paid to the Plaintiffs, the Executors of B. at the said Feasts, so long as the 1000 l. shall remain in the Hands of C. for it appears, upon the whole Deed, that the said 1000 l. were the Monies of B. in as much as it is recited, that they were delivered to C. per Dominam D. P. Wife of B. who cannot have any Monies which are her own proper Monies. Also there is Allowance made by B. of divers Sums, Parcel of it, by C. and this Sum engaged by B. to save C. harmless of a Suit in the Exchequer; and it was the Intent of the Parties, that C. should pay the said 100 l. so long as the 1000 l. should remain in his Hands, which was but Interest for the 1000 l. and forasmuch as the 1000 l. which is the Principal upon the whole Deed, appears to be the Monies of B. and after his Death belonging to A. his Executor, A. the Executor shall have the 100 l. so long as the 1000 l. remains in the Hand of C. though not named, for that the Principal belongs to him.*

*1. Rot. Abr. 913. Popham and Hunt.*

Administrator shall have Covenant by the Equity of the Statute 33 Ed. 2. cap. 11. 9 Rep. 40. Hensloe's Case.

*A. by Indenture enfeoffs B. in Fee, and B. covenants with A. and his Heirs, That if B. or his Heirs fail of doing a certain Act Yearly to A. and his Heirs; then, as often as any Failure shall be made, 5 l. Penalty to A. or his Heirs: A. dies, his Executors or Administrators may by Action of Debt re-*

*Arrears of  
Penalties go  
to Executors,  
but future to  
the Heir.*

cover the Arrears of the *l.* Penalties due at his Death, but the future growing Penalties shall go to the Heir of *A.* for which he shall have Action of Debt. *Dier 24. Q. Cas. Liver.*

The Assignee of a Lessor, or Lessee for Years, and every Assignee of such Assignee, their Executors or Administrators, or the Assignee of such Executor or Administrator, may have Action of Covenant for the Breach of any Covenant in the Lease, as to repair the Premisses, or touching any Thing in *Effe*, Parcel of the Demise, or relating to the House or Land demised. *5 Rep. 16. Godb. 69.* or the quiet Enjoyment thereof, though the Covenant be not for the Lessor or Lessee, and their Executors, Administrators and Assigns. *Ibid.*

Executors and Administrators shall take Advantage of inherent Covenants, though they be not named.

If *A.* by his Deed acknowledge to *B.* That he had in his Custody an Obligation of *400 l.* in which *C.* is bound to *B.* and that he would be ready, *ad omnia tempora cum inde requisitus esset ad redeliberand' prædict' scriptorum obligatorum præfatis* *B.* and after *B.* dies before any Request made; and after *E.* the Executor of *B.* demands this Obligation of *A.* and he refuseth to deliver it, *E.* shall have Action of Covenant upon this Deed, although that the Covenant was to deliver it to the Testator upon Request; which implies, That the Request should be also by the Testator, inasmuch as the Thing to be delivered, (*viz.* the Obligation) goes to the Executor, and the Executor represents the Person of the

*Covenant to deliver to the Testator upon Request, yet Executor shall request and have Action on Refusal.*

Testator ; as in Chapman's Case, Com. 28 b; and 1 Rol. Abr. 913, 914. Walker's Case.

Declaration, That the Defendant enfeoffed his Testator in certain Lands, and that he covenanted for him and his Heirs, that he was seized of a good Estate in Fee, and he alledged the Breach. *Per Hob. and Winch* present only in Court, the Covenant being made with the Heir, the Executor shall not have Action of Covenant, for it is annexed to the Land. *Winch p. 19. Bull and Frankester.*

Where Heir  
shall have the  
Action, and  
not the Exe-  
cutor.

**Surviving  
Covenantee  
to bring the  
Action, tho'  
he hath no  
Benefit.**

Indenture of Covenants between Two of the one Part, and one *Yate* of the other Part. One Covenant was ; It is agreed between the said Parties, That *Yate* shall enter into Bond to pay *Rolls* (by Name), which was One of the Two of the one Part, 160 £ by such a Day, which was not paid : *Rolls* dies, the Plaintiff takes out Administration and brought Covenant against *Yate* ; it lies not, for tho' the Money was to be paid to *Rolls*, who is dead, yet he who survives, and is Party to the Indenture, ought to bring the Action.

*Yel. 177. Rolls and Yates.* So I covenant with *B.* and *C.* jointly to perform a certain Act to *B.* only ; I break the Covenant, and then *B.* dies, and *C.* survives, the Executors or Administrators of *B.* cannot sue me on this Covenant, nor shall have any Benefit by it ; for though the Act was to be done to *B.* only, yet the Action of Covenant goes to *C.* only, who survived *B.* and after his Death, to his Executors or Administrators. *2 Brownl. 297. Unc. v. Dy. 350. Pl. 20.*

Morley's Case.

Note : Brian, Bishop of Winchester, seized By the Exe-  
of a Rectory in Right of his Bishoprick, de-  
miseth it by Indenture to J. S. for 21 Years,  
and J. S. thereby covenants with the said  
Bishop, and his Successors, to repair the  
House and Barns ; during the Term the said  
Bishop dies, and after J. S. assigns his Term  
to S. G. and Bishop Morley is Successor in that  
Bishoprick, and he dies before the Term of  
J. S. was expired ; and after S. G. dies, and  
the Executor of Bishop Morley brings Action  
of Covenant against Executors of S. G. for  
Breach of Covenant by S. G. in his Life, in  
not repairing in the Life of Bishop Morley ;  
it well lies for the Successor Bishop's Execu-  
tor. 2 Vent. 56.

Covenant brought against Executors or Admi-  
nistrators.

In a Lease for Years, by Deed indented, the Words, [Yielding and Paying] during the Term, so much Rent, are an express Covenant to pay the Rent ; upon which an Action of Covenant lies against the Lessee, or his Executors or Administrators, though they are not named after his Death : So would it have been if those Words had been only a Covenant implied in Law. Stiles 307, 416, 432. Tel. 387.

Covenant by the Plaintiff, as Executor of J. S. for that the Defendant covenanted with J. S. his Heirs and Assigns, That they should enjoy the Land, and it was an Estate of Inheritance; yet the Breach being in the Testator's

testator's Life-time, the Executor had well brought the Action for Damages. 1 *Ventr.* 176. *Lucy and Levington.* 2 *Lev.* 26. 2 *Keeble* 831. *Mesme Case.*

*Covenant brought by the Heir.*

Declaration, That the Defendant enfeoffed his Testator in certain Lands, and that he covenanted for him and his Heirs, That he was seized of a good Estate in Fee, and he alledgedeth the Breach. *Per Cur'*, the Covenant being made with the Heir, the Executor shall not have the Action, for the Covenant is annexed to the Land. *Winch p. 19. Bull and Frankester.* *Vide supra.*

**Against Heir.** If a Man covenant for him and his Heirs to do any Thing, hereby his Heirs are bound; but otherwise, except an Heir be bound by the Deed by express Name, he shall scarcely be bound in any Case. 5 *Rep.* 17. *Br. Covenant* 38. 32 *H. 6.* 32. *Dyer* 257. *Fitz. Covenant* 31. And therefore, if Lessee for Years be ousted by any other but the Heir himself, no Action of Covenant will lie against the Heir, unless there be an express Covenant wherein he is bound; but if he be ousted by the Heir, it seems this Action of Covenant will lie against him; but if he be ousted by an elder Title from the Lessor, *contra*, for there the Heir shall not be charged.

*Where Heir shall have the Action.*

**Heir.**

*A.* enfeoffs *B.* in Fee, and covenants or warrants to *B.* and his Heirs, the Heir of *B.* shall take Advantage of it. *Dyer* 338.

So if *A.* covenant with *B.* and his Heirs to enfeoff *B.* and his Heirs of Land, and *B.* dies before it's done, his Heir shall take Advantage of it. *Ibid.*

And if *A.* *B.* and *C.* have Land in Parcenary, and purchase other Lands in Fee, and they covenant each to the other, his Heirs and Assigns, to make such Conveyance to the Heir of him who dies first, of a Third Part, as he shall devise here, the Heir, and not the Executors, shall take Advantage of this Covenant. *5 Rep. 17.*

*Decanus & Capitalus Ecclesiae Cathedralis sanctæ & individuæ Trinitatis Bristol, queruntur de C. G. in Custod' Mar', &c. de placito conventiones fract'. Dean and Chapter Demise to H. and H. assigned to W. G. W. G. made his Will, and made the Defendant Executor, and Breach assigned in not repairing a Barn (as G. H. had covenanted), which was not repaired by the Testator, nor the Executor : The Plaintiff sues the Defendant in his own Right, and they ought to have sued him as sued in his own Right, whereas he ought to be sued as Executor.*

*As Hob. 188, 281. Cro. Jac. 647. And Judgment ought to be, De bonis Testatoris, although the Breach be the proper Default of the Executors ; and so the Action mistaken.*

*Sanders. D. and Bishop of B. versus Guise, & 2 Keb. 285.*

On Covenant against Executor, on express Covenant by the Testator, for him, his Executors and Administrators, on Demise to the Testator for Rent, Covenant will bind Executors, and an Executor is as an Assignee, as grounded on the Deed ; but if Breach happens not while he is Assignee, but after his

**Executor,  
how to plead.**

**Defendant  
pleads Assign-  
ment before  
Rent Arrear.**

his Assignment, then it must be against the second Assignee. The Executors are liable to Rent, incurred before Assignment in their own Right, but after Assignment only, as Executor: Also, had the Testator assigned, the Executor might on Debt or Covenant plead *Nil debet*, or fully administered in Covenant to repair; where Assignee is chargeable, so long as he hath Possession, if it be brought as Executor, Judgment shall only be, *De bonis Testatoris*. The Action in the Principal Case was for 240*l.* As to one Quarter, he pleads *Nil debet*, as to the rest fully administered. *Twissden* conceived this no Plea in Covenant, being charged as well for the Profits, as the Overplus; therefore the Defendant should have pleaded Specially, That the Land was worth but so much, *ultra quod*, no Assets. 3 Keb. 189, 446, 466, & 493. *Boulton* and *Camam.*

Covenant against the Defendants, Executors of C. Lessee, for Rent Arrear in the Defendant's Time: Defendant pleaded Assignment before Rent Arrear. Plaintiff demurs; and *per Cur'*, though the Debt may be in the *debet & detinet*, on the Executor's Possession, and then such Assignment is a good Plea; *contra*, on express Covenant, where the Defendant is charged as such; but if charged as Assignee only, then the Plea were good, by Assignment before the Rent Arrear; and here Judgment must be, *De bonis Testatoris*: Therefore Judgment *pro Quer'*. 3 Keb. 367. *Wigson* and *Gerrard.* This Case is mistaken, being of a Revocation.

If a Man do covenant for himself, only to pay Money, build an House, or quiet Enjoyment,

joyment, and the like, and doth not say in the Covenant, his Executors or Administrators; yet his Executors or Administrators hereby shall be bound, and shall be charged.

If Lessee *pro Years* covenant for himself to repair the Houses demised, omitting other Words. Q. If he be bound to repair, but only during his Life, and Administrators are not bound; but if these Words be added, [during the Term,] they are bound: So if the Covenant be to discharge the Tenant of all Quit-rents. 10 H. 7. 10. Br. Covenant 38.

Dyer 257.

A. covenanted with B. to put the Son of A. Apprentice to B. or otherwise, That the Executor of A. shall pay to B. 20*l.* (not saying A. himself, or his Executors, shall pay 20*l.*) if A. dies, not having performed the Covenant, yet his Executors, are not chargeable, for it cannot be a Debt in the Executor, which was none in the Testator. Cro. Eliz. 232. Perrot and Austin. But if A. covenant to pay 20*l.* to B. not naming his Executors or Administrators, yet they are chargeable by Action of Debt or Covenant after the Death of A. because he covenanted for himself.

A Custom is in Bristol, That *conventio ore tenus facta*, shall bind the Covenantor as strongly as if it were made by Writing; this does not extend to the Executors of the Covenantor. 1 Leon. p. 12. Wood's Case. Q. le Liv.

A. leaseth Land to B. for Life of B. B. by Indenture grants, bargains and sells his Interest to C. for 20 Years, to hold in such Manner and Form as B. had the same, and not otherwise; B. dies within the 20 Years, and A. ousts C. resolved that C. can have

Covenant,  
That the Ex-  
ecutors of A.  
shall pay to  
B. 20*l.* not  
naming him-  
self, no Cove-  
nant lies.

No Covenant against Executor, because determined.

no Action of Covenant against the Executor or Administrator of *B.* for the Covenant and Warranty of *B.* determined by his Death, together with his Estate. *1 Leon.* 179. *Et Cro. Eliz.* 157.

Covenant to teach an Apprentice his Trade, binds the Executors.

Covenant against an Executor, upon the Covenant of the Testator, to teach an Apprentice his Trade: It was moved, That this Covenant was Personal to the Testator, and does not bind his Executors, but only binds the Master, during his Life, to teach the Apprentice. But *per Cur'*, it binds the Executors also, and they ought to see the Apprentice taught his Trade; and if they are not of the Trade, they ought to assign him to another who is of the Trade, so that he may be taught. *1 Lev.* 177. *Walker and Hull.* Vide supra.

Against Executors, for Arrears of Rent.

Covenant against Executors, upon Arrears of Rent, and it appears not whether the Arrears were in the Life of the Testator, or after. If it be in the *Detinet* only, and after a Verdict, it shall be intended to be in Arrear before his Death to support the Verdict. *1 Sid.* p. 375, 376. *Stephenson's Case.* *Et 2 Keeble* 400.

#### Against the Heir.

In an Assumption against an Heir, upon a Promise to pay Money due upon his Ancestor's Bond, it ought to be averred, That the Heirs of the Obligor were expressly bound. *2 Sand.* 136.

## C H A P. XXXIX.

In what Cases it lies against the Assignee, and against the Assignor, or both; or, what Covenants shall bind the Assignee, or not.

*Vide infra.*

**A** Signee of the Lessee shall be charged Assigns not in Covenant for Repairs (though As. named. signs are not named in the Covenant) in Respect of his having Possession; so shall the Assignee of the Reversion have Action of Covenant for Default of Repairs, in Respect of his having the Reversion, altho' the Assignees are not named in the Covenant. *1 Lev. 109. Knight and Buckley. 1 Sid. 157. Raymond 80. 1 Keb. 565. Id. Cas.*

Executor assigned a Term for Years, As. Assignee, how signee parted with his Interest to another; chargeable. the Lessor brought Covenant against Assignee for Rent, who pleaded, That he had assigned his Interest, &c. but without Notice given to the Lessor, or Acceptance of the Rent, &c. and held good, because the Assignee is only chargeable in Respect of the Land; and, when that is gone, he is no longer liable. *4 Mod. 72, 76.*

If *A* demise to *D*. divers Parcels of Land, Where part is and Lessee covenants for him and his Assigns assigned. to repair, &c. and after the Lessee assigns to *B*. all his Estate, in Parcel of the Land demised, and afterwards *B*. doth not repair that to him assigned, Lessor may have Action of Covenant against *B*. the Assignee. *Tr. 17 Car. B. R. Conbam and King. Cro. Car. 221. Vid. le Cas.*

If

**Covenant for Rent against the first Lessee, notwithstanding Acceptance of the Rent of the Assignee.**

If a Man lets Land for Years, rendering Rent, and Lessee covenants for him and his Assigns to repair the House during the Term, and after the Lessee assigns over the Term, and the Lessor accepts the Rent of the Assignee, and after the Covenant is broken; notwithstanding the Acceptance of the Rent of the Assignee, the Action of Covenant lies against the first Lessee, for the Lessee had covenanted expressly for him and his Assigns, and this Personal Covenant cannot be transferred by the Acceptance of the Rent. *M. 10 Jac. Ventrice and Goodbeap, Barnard and Goskale, Bret and Cumberland's Case. 16 Car. I. B. R. Norton and Ackland, Countess of Devon and Collier, Pa. 20 Car. B. R. Crofts and Taylor.*

**Covenant, where lies against the Assignee or Lessee Election.**

If Lessee covenant, That he and his Assigns shall repair the House demised, and Lessee grants over his Term, and the Assignee doth not repair; Action of Covenant lies either against the Assignee at Common Law, for that this is a Covenant which runs with the Land, or it lies against the Lessee, at the Election of the Lessor. *25 H. 8. Br. Covenant 32.*

No Assignment, nor Acceptance of the Rent, by the Hands of the Assignee, shall hinder him from suing as Executor, no more than if Lessee binds himself in a Bond to pay his Rent, his Assignment and Acceptance of the Rent, by the Lessor of the Assignee, shall not take away the Advantage of his Obligation.

Plaintiff was possess'd of a Term of 30 Years, and makes a Lease to the Defendant for 16 Years; in which the Defendant (Lessee) covenants not to build upon a Parcel

of Land demised ; Breach assigned in Building.

Defendant pleads, after and before the Breach assigned, the Plaintiff grants the Reversion to *J. S.* to which Grant the Tenant attorns. Plaintiff demurs generally.

1. Q. If the Covenant passeth by the Grant of the Reversion to the Grantee, for then the Action will not lie for the Grantor, or that the Covenant remains with the Assignor, and then a Right of Action may be sued upon the Covenant only, pass'd by the Assignment to the Grantee. *Per Stat. H. 8.* which is in the Affirmative only, (*viz.*) That the Grantee shall have Action of Covenants, for if so, then the Action may be brought either by the Grantor, with whom the Covenant remains, or by the Grantee to whom an Action is given by the Statute, but agreed not by both, for a Recovery by one shall be a Bar to the other; and it was said, That this being an express Covenant, the Party to whom the Covenant is made may sue it, after Assignment, as *Batchelor's Case*, and *Midlemore's Case*. *In 1 Crook. Cro. Car. 188.*

2. Q. If this Covenant be not transferred with the Land, by the Assignment at Common Law, as appurtenant to the Estate, being concerning the Estate; and to this was cited, a Case between *Harper and Burroughs*, *29 Car. 2. B. R.* wherein Covenant for Non-Payment of Rent, in the Name of the Grantee, the Court will intend the Action brought upon the *Reddendo*, which is a Covenant in Law, and passeth by the Grant to the Grantee at Common Law, with the Estate; and it was said, It would be greatly inconvenient if the Covenant should remain with the

the Grantor after the Assignment, for then he may release it after the Assignment, as was in *Midlemore and Goodale's Case*; but no Resolution as to these. 3 Lev. 154. *Beely and Parry.*

Covenant for  
Rent lies a.  
gainst Lessee  
after Assign-  
ment of the  
Term, *per the*  
Grantee of  
the Reversion.

Covenant for Non-Payment of Rent, and declares, That P. was seized of the Place, where, &c. and demised to the Defendant, who covenanted to pay the Rent, and that after P. by Indenture, for the Considerations therein mentioned, (which Indenture *Proferit in Curia*, but it is not entered *in bac verba*), grants the Reversion to the Plaintiff in Fee; to which the Defendant attorned, and for Rent Arrear the Action is brought in the County where the Land lies, as it ought. Defendant pleads, That such a Day he assigned his Term, at which Time no Rent was in Arrear, but doth not plead any Acceptance of the Rent *per* the Plaintiff of the Assignee, nor Notice of the Assignment; Upon which the Plaintiff demurs generally. *Per Cur'*, the Action well lies against the Lessee of the Term by the Grantee of the Reversion, being express Covenant after the Assignment. 1 Crok. *Batchelor and Gage, Thursby and Hall versus Platt.* 1 Sid. tho' Notice and Acceptance of the Rent had been pleaded; but for a Fault in the Declaration, Judgment was stayed. *Scil'*, That the Plaintiff doth not mention to whose Use the Grant of the Reversion was, nor any Consideration, but the Considerations in the Indenture; and it appears not what they were.

3 Lev. 233. *Edwards and Morgan.* 36 Car. 2. So Action by the Devisee of the Reversion. *Godb. 161. Bristow's Case.* Vide 3 Lev. 295.

Grant of a  
Reversion to  
others, with-  
out saying to  
whose Use.

In the *Common Pleas* the Plaintiff declared, That she was possess'd of certain Houses in; &c. for a certain Term of Years; and that she demised the Houses to R. G. for 21 Years, under a certain Rent, which he covenanted to pay. The Lessee entered, and made his Will, and made *Susan Gill Executrix*, and died. That she proved the Will, and entered, and assigned the Term to the Defendant; who entered, and was possess'd, &c. Breach, That *Pritchier* had not paid the Rent, after the Assignment made to him by the Executor *S. G.* Defendant *Pritchier* pleads, That before the Rent became due, he assigned his Interest to *James Mott*, but did not plead Notice given to the Plaintiff, or that she had accepted the Rent. On Demurrer in *C. B.* to this Plea, Judgment was there given for the Plaintiff, and Error brought in *B. R.*

Q. Whether the Defendant *Pritchier* ought to have pleaded, That he had given the Plaintiff *Towry* Notice of the Assignment. *Per Cur'*, in *B. R.* Notice of the Assignment to the Plaintiff, &c. was not then necessary; for by the Assignment the Privity of Estate was gone, the Assignee is chargeable, by Reason of the Land; and when he has parted with his Interest, there can be no Reason why he should be any longer liable, especially since the Executrix of the Lessee is still bound to perform the Covenants in the Lease, as long as she has Assets: And so was it ruled in *Helier and Casbard's Case*. *Sid. 266.* And *Overton and Siddal's Case*, in *Cro. Eliz. 555.* which saith, That an Action doth not lie against an Executor of a Lessee for Years, after such Executor had assigned

## The Law of Covenants.

the Term, because there is neither Privity of Contract, or Estate, remaining in him to support the Action. This has been denied to be Law, *Causa qua supra. 2 Ventr. 234. 4 Mod. 71. Pritchard and Tovey.*

Lessee covenants to pay Yearly, during the Term of 21 Years, 20 s. to the Churchwardens of S. and to repair the Houses : The Assignee did not pay the Rent, and Action is brought. *Per Cur'*, the Assignee is not chargeable with this Covenant of Payment of this Annual Sum, because it's a mere collateral Covenant, and it was not well assigned, for it is not shewed for what Time the Rent was in Arrear. *Cro. Jac. 438. Mayou versus Buckhurst.*

**Assignee not bound to pay an Annual Sum, being a collateral Covenant.**

**Note,** That though upon express Covenant to pay Rent, Covenant lies against the Lessee for Rent Arrear, after his Assignment; yet, it seems, such Action does not lie against Lessee upon Covenant in Law, (*Yielding and Paying*) after the Assignment. *Sid. 447.*

Testator Lessee covenanted for himself, his Executors and Assigns, That he would not erect any Building in the Garden, to the Prejudice of the Plaintiff's Lights, in his House adjoining, &c. and alledges, That such an Assignee of the Testator's, against that Covenant, had erected an House in the said Garden, to the Prejudice of the Plaintiff's Lights in his House adjoining. Defendant pleads, the said Lessee assigned over his House to one J. S. who entered and paid his Rent to the Plaintiff, and the Plaintiff accepted him for his Tenant ; and demanded

Judg-

Judgment *si Actio*. Demurrer. *Per Cur'*, It is an express Covenant, That he shall not build, it shall bind him and his Executors, and no Assignment nor Acceptance of the Rent, by the Hands of the Assignee, shall take from him the Advantage of suing him or his Executors, upon an express Covenant. *Cro. Car. 188. Batchelor and Gage, Executors of Gage,*  
*3 Lev. 155, 233, 326. 1 Sand. 240.*

Covenant against the Defendant, as Assignee of an Assignee, for not repairing of an House, lies, though the Defendant is but Assignee of Parcel of the Things demised; and it was said, he was not chargeable with this Covenant, no more than the Assignee of Parcel shall be charged in Debt for Rent; but the Action lies against the First Lessee, as in *Walker's Case*.

But *per Cur'*, This Covenant is dividable, and follows the Land, with which the Defendant, as Assignee, is chargeable by the Common Law, or by the Statute 32 H. 8. *Cro. Car. 221. Congbam and King*.

A Parishioner covenants with the Parson to pay him Yearly at *Lammas-Day*, so long as he shall be Parson, 11 s. and the Parson, in Consideration of this, and upon Receipt of the said 11 s. covenants by the same Deed, with him and his Assigns, *Exonerare & acquiescere* him of the Payment of the Tythes of *B. Close*, so long as he shall be Parson; the Parson lets the Close for a Year, and so from Year to Year, *Quamdiu Ambabus, &c.* the Parson, after Three Years Libels in Court Christian. The Defendant moves to have a Prohibition. 1. This is but a Covenant, and not a Lease, for it depends upon a Con-

Affinee  
ought to be  
Affinee of  
the whole.

dition Precedent, upon the Receipt of 11 s. 2. Admit this was a Covenant, yet Prohibition lies, for his Remedy is by Action of Covenant. In this Case, the Affinee is not Affinee within the Intent of the Condition, for he ought to be Affinee of the whole Estate; and here, after the first Year, he had but Estate at Will. *Stratton's Case*, 44 Eliz. B. R. Rotb. 485. One covenanted for him and his Assigns to repair an House to him demised, and he assigns over his Land in Part; and it was held, That this was not an Assignment within the Covenant. *Vide 5 Rep. 97. Goodale's Case. 2 Rol. Rep. 121. Alderes and Wray.*

Lessee assigns all his Term in Part of the Land, Lessor shall have a Joint Action against Lessee and Affinee. *Cro. Jac. 411.*

*Dean and Chapter of Windsor*, 30 H. 8. let an House to A. for Years, by Indenture, and A. covenanted to repair the House at all Times necessary, during the Term. A. grants his Estate to Hyde, and dies. Covenant is brought against Hyde for not repairing; who pleaded, *Quod non permisit Domum prædictam esse ruinosam & discopertam*, at any Time necessary, &c. *Per Cur'*, an Action of Covenant lies against an Affinee, though he be not named. *Cro. Eliz. 457, & 552.*

Against an  
Affinee, tho'  
he be not na-  
med.

If a Man makes a Lease for Years, and covenants with him and his Assigns, his Affinee by Parcel shall have Action of Covenant. *3 Rep. 63. a. Auder and Nokes's Case*, cited there; which Case is reported in *3 Cro. Eliz. 373, & 436.*

Note, An Assignee of a Reversion may bring Action of Covenant against a Lessee, after he had assigned the Term, notwithstanding the Acceptance of the Rent from the Assignee of the Lessee. *4 Mod. 81.*

A Man made a Lease for 30 Years, the Lessor covenanted to repair the House: The Lessee granted Parcel of the Term for 10 Years. It was holden, That his Grantee shall not have an Action of Covenant, by the Statute 32 Hen. 8. of Condition, for he is not Tenant to the First Lessor; but if the Lessor grants his Reversion for Years, his Grantee shall have Covenant or Benefit of the Condition, with which the Lessee is charged, for he is an Assignee within the Statute, because the Lessee holdeth of him.

*More 139.*

Count against the Assignee, of the Inheritance of a Messuage, upon the Indenture of Purchase made by the Plaintiff to the First Purchaser; wherein he covenant for him and his Assigns, with the Plaintiff, to make a Ditch and Fence, &c. and to maintain this a good Fence for ever. Breach, That the said Fence was ruinous, and that neither the said J. V. the First Purchaser, in his Life, nor the Defendant, his Assignee, after his Death, had kept it in good Repair.

**Not against  
the Assignee  
for Breach, in  
the Time of  
the Assignor.**

After Verdict for the Plaintiff, Judgment was arrested, for that the Action doth not lie against the Defendant, as Assignee for Breach, in the Time of his Assignor ; and the Breach being assigned for Default of Reparation of the Fence, as well in the Time of *J. v. Assignor*, to the Defendant, as in the Time of the Defendant, and Damages being entirely given, the Plaintiff could not have Judgment. *Lut. 363; Brillin and Vaux.*

*A.* and *B.* agree *per Writing*, concerning the Purchase of Lands in *F.* and after *A.* covenants with *B.* to assign to him the Lands in the Writing.

In Action on this Covenant, *B.* may not shew in his Count that *A.* covenanted to assign the Lands in *F.* but the Lands in the Writing, and shew this ; and that the Lands in the Writing and in the Declaration are the same. *Lut. 489. a.*

*Covenant. Assignment.*

Note : The Stat. 32 H. 8. c. 34. doth not To what extend to Covenants upon Estates in Fee, or Estates the in Tail, but only upon Leases for Lives, or <sup>Stat. 32 H. 8.</sup> for Years. <sup>extends to.</sup>

And this Stat. 32 H. 8. c. 34. extends to Covenants which touch or concern the Thing demised, and not to collateral Covenants, where it lies by the Assignee or not, who are Assignees within Stat. 32 H. 8.

Defendant seised of Lands in Fee, let them for Life, Remainder for Life, and after acknowledges a Statute, and sold the Reversion, and covenants with the Bargainee, his Heirs and Assigns, that it should be discharged within Two Years of all Statutes and Incumbrances, except the Leafes for Life ; the Statute is extended, and thereupon the Rent and Reversion is extended : The Bargainee grants this Reversion to the Plaintiff, who for not discharging this Statute, brings Covenant. It lies not :

1. Because the Covenant was broken before the Plaintiff's Purchase, the Land being then in Extent, and so a Thing in Action ; it could not be transferred over, and so Action lies not.
2. Stat. 32 H. 8. extends not to Covenants on Estates in Fee, &c. *Vid supra* : And therefore this Assignee was out of the Stat. Cr. El. 863. *Lewes and Ridge.*

Assignee of Assignee shall have Action of Covenant, so the Executors of the Assignee of an Assignee, so the Assignees of Executors or Administrators of every Assignee, for all are comprised within this Word [Assigns,] for

## The Law of Covenants.

for the same Right which was in the Testator or Intestate, shall go to his Executors or Administrators, 5 Rep. 17. b. Spencer's Case,

Action of  
Covenant as  
Assignee, and  
names not  
himself As-  
signee.

Plaintiff brings Action of Covenant as Assignee, and does not name himself Assignee, (but after in the Declaration shews how he is Assignee) it's good enough, especially after Verdict, Cr. El. 822.

Assignee of a Copyhold is within the Statute to have Action of Covenant, 1 Keb. 357.

Assignees of Executors and Administrators Tenants by Statute or *Elegit*, or after Sale upon a *Fi' fae'*, a Husband in Right of his Wife shall take Advantage of inherent Covenants, 5 Rep. 17.

If a Man make a Lease for Years, and covenant with him and his Assigns, his Assignee *per Parole* shall have Action of Covenant, and so Feoffee *per Parole* shall vouch as Assignee, 3 Rep. 63. a.

Action of Co-  
venant lies  
against the  
first Lessee,  
after Assign-  
ment and Ac-  
ceptance.

It was a Question in *Matures* and *Westwood's Case*, Whether the Assignee of the Reversion shall have Action of Covenant against the first Lessee after the Assignment of his Term? *Per Gawdy*, the Action well lies. It was admitted by all, that tho' he were but an Assignee of a Reversion for Years, yet he was a sufficient Assignee to have Action of Covenant. The Defendant's Plea was ill: He pleads he granted his Lease, &c. but doth not shew the Place, so it's not issuable to be tried.

If Lessee assign, and after Lessor accept of the Assignee for his Tenant, he may not after maintain Debt for Rent against the first Lessee, but he may maintain Covenant against him: And it was also adjudged, That if the Lessee assign his Term, and after the

Lessor assigned his Reversion, and the Assignee of the Reversion accepts the Rent of the Assignee of the Term, yet he may have Action of Covenant against the first Lessee, *1 Sid. 402. Thurby and Platt's Case, 3 Rep. 22. Walker's Case, 2 Keb. 448, 492. 1 Lev. 259.*

The Act of the Lessee shall not divide the Action of the Lessor. Lessee assigns all his Term in Part of the Land, Lessor shall have a joint Action against Lessee and Assignee: So if Two Lessees make a Partition, the Lessor may have one Action against them, *Cr. Jac. 411. the Bailiff and Commonalty of Ipswich's Case, 3 Bulst. 211. mesme Case.*

*T. Ifstead, Executor of J. Ifstead, Executor of R. Ifstead, brought Covenant against R. Stonely, Assignee of J. M. Assignee of Q. Elizabeth, Sister and Heir of Q. Mary, Sister and Heir of K. Edward, Son and Heir of Henry VIII. Assignee of the Prior and Covent of St. Pancras; and declared, That the said Prior by his Deed-Indent' demised to the said R. Ifstead the Land, &c. for the Term of Forty Years, and in the same Indenture granted as ensues, (viz.) Et ulterius dictus Prior & Conventus conceff' pro se & Successoribus suis quod legitimum esset, dicto R. Ifstead, & suis Assignat' ad aliquod tempus infra præd' Terminum vel ad finem dicti Terminii habere dictam dimissionem suam renovat', &c. And counts further, how the Reversion came to King Henry VIII. and from him to the Queen, and from her to the Defendants? And further, how the Lease came to the Plaintiff according to the Contents of the Writ. And the Defendant seised of the Reversion, and the Plaintiff possess'd of the Lease, and that he required him to renew the Term; And the Defendant refused.*

*Act of the  
Lessee shall  
not divide  
the Action of  
the Lessor.*

*Covenant to  
renew a  
Term.*

## The Law of Covenants.

*Stat. 32 H. 8.  
extends not  
to collateral  
Covenants.*

refused. It was moved, that this Action lies not against the Assignee of the Reversion upon the *Stat. 32 H. 8.* For tho' the Words are general, yet they are not generally to be taken: For of the Covenants which do not depend upon the Interest of the Land, but are collateral Things, the Grantees of Reversions shall not take Advantage; as if the Covenant were, That the Lessor shall yearly deliver to the Lessee 10*l.* or to repair a Bridge, not being on the Land leased; for the Law never intends, that other Covenants than such as depend upon the Land, as to repair a Mes-susage, Fences, &c. Payment of Rent, and Penalties for Non-payment, &c. and this Covenant, which is collateral, does not depend upon the first Term, nor upon the Land during the said Term, but is to make a new Lease, which is, as if the Lessor had covenanted to have made a Lease of other Lands which were not leased; but the Judges were of Opinion for the Plaintiff. *I Anderson 82. Instead's Case,* but perhaps for some other Reason.

**Baron and Feme grant the Reversion, Grantee brings covenant as Assignee of the Baron only.**

**Assignee by Estopel can not have Action on Covenant.**

Baron and Feme seised, and to the Heirs of the Husband, let to the Defendant; the Defendant covenants with them, and the Heirs of the Husband, to do all Reparations, they convey the Reversion to the Plaintiff, who brought Covenant as Assignee to the Husband only, and good. *Cr. Car. 285. Major and Talbot, Jones 305. mesme Case.*

The Assignee of a Lease by Estopel shall not take Advantage, so as to have any Action upon Covenant; *Cr. El. 437.* The Declaration was, *Quod cum Johannes King, 10 Eliz.* let to the Defendant for Years, *Virtute cuius,* he was possessed, and granted to *Abel* by Indenture with the Covenant, who in 15 El. assigned

assigned it to the Plaintiff; and further al-  
ledgeth, That long Time before that the said  
*J. K.* had any Thing, one *Robert King* was  
seised in Fee, *viz.* 7 El. and so seised, died  
seised in 15 El. and it descended to *Thomas  
King*, who entered upon the Plaintiff and  
ousted him; so he doth not shew that *John  
King*, who made the Lease, had any Thing,  
for *Robert King* was thereof then seised; and  
then when *John King* let it to the Defendant,  
and he granted his Term by Indenture, no-  
thing passed but by Estoppel, then the Lessee  
by Estoppel cannot assign any Thing over,  
and then the Plaintiff is not Assignee to  
maintain this Action of Covenant, Cr. El. 436.

*Nokes and Awger.*

The Assignee shall have Action of Cove- Where Af-  
niant without shewing any Deed of Assign- signee need  
ment [in Covenant for peaceable Enjoyment not shew any  
without Interruption :] For it is a Covenant Deed of Af-  
which runs with the Estate, and if the Estate signment.  
be passed without Deed, the Assignee shall  
have the Benefit of the Covenant also, Cr. El.  
436. 373. *Nokes's Case.*

*Note:* Altho' upon express Covenant for to  
pay Rent, Covenant lies against the Lessee  
for Rent Arrear after his Assignment; yet it  
seems such Action doth not lie against the  
Lessee upon a Covenant in Law; as upon  
yeilding and paying after the Assignment;  
*I Sid. 447. Devant.*

Assignee of a Reversion brings Debt *pro Rente*; Assignee of a  
Defendant pleads to Part, *Non debet*; to other Term shall  
Part, That the Lessor demised the Land to have Remedy  
him, rendring Rent; and by the same Inden- upon a Co-  
ture covenants for himself, his Heirs and Af- venant by  
signs, with the Lessee, his Executors and Af- Way of Re-  
signs, That if he be enforced to pay any tainer.

## The Law of Covenants.

Charges or Issues lost, that he shall withhold so much of his Rent. *Per Cur'*, the Assignee of a Term shall have Remedy upon a Covenant, by Way of Retainer against the Assignee of a Reversion; and this both at Common Law, and by the Stat. 32 H. 8. Cr. Car. 137. *Bayley versus Clifford.*

Covenant that the Lessee, nor any of his Under-Tenants or Assigns, should not dig Gravel, other than for Repairs; and Plaintiff alledged, one *B.* an Under-Tenant digged. Defendant takes Issue, that he was not Sub-Tenant *modo & forma*, the Lessor having made another Lease before of *Kills*, which Lessee made a Lease of the Pits to *H.* for Part of his Term *H.* assigned to *B.* *Q.* is, If *B.* be such a Sub-Tenant according to the Covenant? It was objected, *B.* is no Under-Tenant to *E.* Lessor for Debt lies not against him: Had the Words been, [None claiming under him should dig,] it had been for the Plaintiff; but *eius tenens*, he cannot be no more than if *E.* had been dead at the Time. *Per Cur'*, one may be Under-Tenant, altho' the Lessor were dead; also Under-Tenant is any that comes under the Lessor's Interest, *Brumfield* against *Williamson*. Covenant that he and his Assigns would pay Rent, the Tenant at Will, or his Assignee, is within the Meaning thereof. Lessee for Forty nine Years of Copyhold, which hath Common in Waste, with Covenant that he nor his Assigns shall not use the Waste with Cattle. If his Under-Assignee of Part put in his Cattle, it is a Breach, and other Tenants than Under-Tenants of the Soil are intended within the Covenant, 1 Keb. 775, 806. *Boarman and Action.*

*Under-Tenants, who.*

In what Cases the Assignee shall be bound, though  
not named. Vid. Reparations.

A Man lets Land for Years, and Lessee  
covenants in this Manner, *Proviso semper &  
præd' J.* (*le Lessee*) doth covenant, that he  
shall repair, maintain and sustain, the Houses  
upon the Premisses, *ad omnia tempora necessaria*, during all the said Term; and after the  
Lessee assigns over the said Term: The As-  
signee shall be bound by this Covenant to re-  
pair the Houses, during the Life of the first  
Lessee, altho' that the Assignee be not na-  
med, for that the Covenant runs with the  
Land, being made for the Maintenance of a  
Thing *in esse*, at the Time of the Lease made:  
But in this Case the Assignee shall not be  
charged in a Writ of Covenant, for any  
Breach after the Death of the first Lessee, in  
as much as this is personal to the Lessee him-  
self, *1 Rol. Abr. 521.* Dean of *Windsor and  
Hide.* *Vide* this Case, *Cr. El. 473, 552. 5 Rep.  
24. a.* A Covenant that runs and rests with  
the Land, lies for or against the Assignee at  
the Common Law, altho' the Assignees be  
not named in the Covenant, *5 Rep. 168.*

D. covenants in his Lease for himself, his Executors and Administrators, to leave Fifteen Acres every Year for Pasture, *absq; cultura*, and that he granted his Estate to the Defendant, and the Defendant *non reliquit* Fifteen Acres *ad Pasturam*, but such a Day and Year plowed up all. It was demurred to the Count, because the Assignee not being named, it is not any Covenant which shall bind the Assignee, for it is collateral. *Per Cur'*, this Covenant is to be performed by

If the Covenant be for the Benefit of the Estate, according to the Nature of the Soil, As signee shall be bound.

Assignee not bound, when the Covenant extends to a Thing that had not Essence at the Time of the Demise made.

Things to be done by the Covenant merely collateral.

the Assignee, altho' he be not named, because it is for the Benefit of the Estate, according to the Nature of the Soil ; but to do a collateral Covenant, as to build *de novo*, or the like, shall not bind him, unless named,  
*Cr. Jac. 125. Cockson and Cock.*

The Diversity in *Spencer's Case*, is,

1. When a Covenant extends to a Thing *in esse*, Parcel of the Demise ; the Thing to be done by Force of the Covenant is *quodammodo* annexed, and appurtenant to the Thing demised, and shall run with the Land and shall, bind the Assignee, altho' that he be not bound by express Words ; but when the Covenant extends to a Thing that had not Essence at the Time of the Demise made, this cannot be annexed or appurtenant to a Thing which had not Essence ; as if Lessee covenant to repair the Houses, &c. as one covenants for himself, his Executors, Administrators, to build a Brick-Wall upon Part of the Premisses ; this shall not bind the Assignee, for the Law will not annex the Covenant to a Thing which hath not Essence.

2. But had the Lessee covenanted for himself and his Assigns, to build a Brick-Wall on Part of the Premisses, for as much as it is to be done upon the Land demised, and the Assignee is to take the Benefit of it ; therefore it shall bind the Assignee by express Words.

3. But tho' the Covenant be for him and his Assigns, yet if the Thing to be done is merely collateral to the Land, and doth not touch or concern the Thing demised in any Sort, there the Assignee shall not be charged ; as if Lessee covenant for him and his Assigns, to build an House upon the Land

of the Lessor, which is not Parcel of the Demise ; or to pay any collateral Sum to the Lessor, or to a Stranger ; this shall not bind the Assignee.

4. If a Man lease Sheep, or other Stock of Cattle, or any other Personal Goods, for any Time, and the Lessee covenants for him and his Assigns, at the End of the Term to deliver other Goods or Chattels as good as the Things demised were, or such a Price for them, and the Lessee assigns the Sheep over : This Covenant shall not bind the Assignee, for this is that is by a Personal Contract, and wants such Privity which is between the Lessor and Lessee, and his Assigns of the Land, in respect of the Reversion ; but in case of a Lease of Personal Goods there is not any Privity, nor any Reversion, but meerly a Thing in Action in the Personality, which cannot bind any but the Covenantor, his Executors, or Administrators, which represent him ; it is the same Law where a Man demiseth House and Lands for Years, with a Stock or Sum of Money, rendring Rent, and the Lessee covenants for himself, his Executors, Administrators, and Assigns, to deliver the Stock, or Sum of Money, at the End of the Term, yet the Assignee shall not be charged with this Covenant : For tho' the Rent reserved be increased by Reason of the Stock or Sum, yet the Rent doth not issue out of the Stock or Sum, but out of the Land only ; and therefore, as to the Stock or Sum the Covenant is Personal, and shall bind the Covenantor, his Executors, or Administrators, and not his Assignee : And it is not certain that the Stock or Sum shall come to the Hands of the Assignee, for it may be wasted, or

If the Covenant be for the Benefit of the Estate, according to the Nature of the Soil, Assignee shall be bound.

Assignee not bound, when the Covenant extends to a Thing that had not Essence at the Time of the Demise made.

Things to be done by the Covenant merely collateral.

the Assignee, altho' he be not named, because it is for the Benefit of the Estate, according to the Nature of the Soil ; but to do a collateral Covenant, as to build *de novo*, or the like, shall not bind him, unless named,  
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2. But had the Lessee covenanted for himself and his Assigns, to build a Brick-Wall on Part of the Premisses, for as much as it is to be done upon the Land demised, and the Assignee is to take the Benefit of it ; therefore it shall bind the Assignee by express Words.

3. But tho' the Covenant be for him and his Assigns, yet if the Thing to be done is merely collateral to the Land, and doth not touch or concern the Thing demised in any Sort, there the Assignee shall not be charged ; as if Lessee covenant for him and his Assigns, to build an House upon the Land

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but a Personal Contract, and wants such Pri-  
vity which is between the Lessor and Lessee,  
and his Assigns of the Land, in respect of  
the Reversion ; but in case of a Lease of  
Personal Goods there is not any Privity, Assignee.  
nor any Reversion, but meerly a Thing in  
Action in the Personality, which cannot  
bind any but the Covenantor, his Exe-  
cutors, or Administrators, which represent  
him ; it is the same Law where a Man demis-  
seth House and Lands for Years, with a  
Stock or Sum of Money, rendring Rent,  
and the Lessee covenants for himself, his  
Executors, Administrators, and Assigns, to  
deliver the Stock, or Sum of Money, at the  
End of the Term, yet the Assignee shall not  
be charged with this Covenant : For tho' the  
Rent reserved be increased by Reason of the  
Stock or Sum, yet the Rent doth not issue out  
of the Stock or Sum, but out of the Land only ;  
and therefore, as to the Stock or Sum the  
Covenant is Personal, and shall bind the Co-  
venantor, his Executors, or Administrators,  
and not his Assignee : And it is not certain  
that the Stock or Sum shall come to the  
Hands of the Assignee, for it may be wasted,  
or

or otherwise consumed, or perish by the Lessee, and therefore the Law cannot determine at the Time of the Lease made, that such Covenant shall bind the Assignee.

Lessee covenants with the Lessor and his Heirs, not naming his Assigns; Lessor grants the Reversion over. Assignees may have Action of Covenant, tho' not named: And Assignees shall have Debt for Rent upon general Words, *Reddendo solvendo*, without being named, 1 Sld. 157. Kitchin and Completer, 1 Reb. 565. 1 Lev. 109. & Raym. 80. *mesme Case.*

## C H A P. XL.

**I**N Covenant the Plaintiff declared upon an Breach assigned Indenture, in which the Defendant had ed did relate covenanted, he was seized in Fee, &c. and to Three Co. would free the Premisses from all Incumbrances: Declaration And another covenant for quiet Enjoyment, concludes, Et And the Breach assigned, was upon an Entry sic frēgit com- and Eviction by another; and concludes, *Et tenetorem, et sic conventionem suam præd' frēgit,* in the Singu- lar Number. Demurrer, because he did not shew what Covenant in particular, *Sed per Cur'*, *convenitio est nomen collectionem.* And if Twenty Breaches had been assigned, he still counts *De placito quod teneat ei conventionem inter eos fac'*. And the Breach being of all Three Covenants, the Recovery in One would be a good Bar in any Action afterwards, to be brought upon either of those Covenants. 2 Mod. 311. After Mr. Mazeen.

In Covenant, if the Sum is miscast, too little Sum miscast or too much, yet it is amendable, and not like amendable. to Debt; which if alledged less than in Truth it is, not shewing the rest is satisfied, it's ill, and not amendable. 3 Keb. 39. Bolton & Lee. 2 Cr. 247. 2 Lev. 56.

Covenant was brought upon Articles inden- tered; and in the Memorandum the Plea was, *De conventione fract'*, but the Declaration was as in Action on the Case, *Quod cum per factum Indentur testatur quod le Deft' concessit,* without alledging it positively; and concludes *not prouid soler;* in Covenant, & sic infregit. Per Cur', this is an Action of Covenant. And it is not necel-

It's not necessary to conclude *& sic fregit*, but the Covenanter being *quod Def. non relaxaret*, a Debt assigned to the Plaintiff without his Licence, and the Breach assigned *quod Def. relaxavit*, not saying without the Licence of the Plaintiff. *Per Cur'*, the Breach is not well assigned, and so

*quer' nil cap. per Billam.* Sir Tho. Jones 229. Coppin & Slaymaker.

Debt on Bond to satisfy for all Goods that an Apprentice should imbezal: And in the Replication assigned a Breach, that he had wasted *diversa bona ad valentiam 100l.* Defendant demurs: And it was excepted to the Replication, that it is too general, not shewing what the Goods were. But *per Cur'*, It is well enough in this Action upon the Bond, where Damages are not to be recovered, but the Penalty of that Obligation upon any Breach. *Aliter*, in Covenant where the Recompence is to be for Damages: And Judgment *pro Quer'*. 1 Lev. 94. French & Pierce. 1 Kebble 467. *Mesme Case*.

Where one brings Action of Covenant for not paying of Money according to the Covenant, he need not alledge that he requested the Defendant to pay it: But where he brings Action of Debt for Money due by Covenant, he ought to alledge a Request. *Tr. 23 Car 1. B. R. Qu.*

In Action of Covenant, the Plaintiff declares, the Defendant covenanted to take the Plaintiff to be his Clerk, and to allow him 2*s.* for every Quire of Paper that he should copy out, and 1*d.* for every Sheet that he should engross, and all usual Fees; and amongst other Breaches he alledged, that he copied out a Bill containing Four Quires and Three Sheets, for which 8*s. 3 d.* was due to him, which the Defendant hath not paid. Verdict and Judgment *pro Quer'*.

Error

Error assigned was, That there could be no In Covenant Apportionment in this Case; for the Covenant for a Sum certis, That he was to allow him 2 s. for copying tain, no Apportionment, unless it be a Quire, but not *pro Rata*. But if he had averred 3 d. to the usual Fee for copying 3 Sheets of Paper, he might have help'd himself upon that Clause. *Allen 9. Needler & Guest.*

*Where Notice need to be laid or not. Vide Tit. Notice.*

Covenant that he should assure such Copy-hold Land to the Plaintiff if he married with his Daughter, *Secundum Leges Ecclesiasticas*. And alledgedeth, that he *rite & legitime* espoused the Daughter of the Defendant. *Per Cur'*, It is sufficient to the Plaintiff to alledge *Licet sepius requisitus*, without giving Notice of the Marriage, for he at his Peril ought to take Notice thereof; and he need not shew a Court to be holden, for he ought to procure a Court to be holden. *Judgment pro Quer'*. *Cr. Fac. 102. Fletcher & Pynsett. 1 Lev. 41. Basset & Morgan.*

Covenant to assure Copy-hold Lands.

Sir B. H. brought Action of Covenant, and declares, Whereas it was covenanted *inter alia*: Whereas the Plaintiff had bought a Park of H. F. esteemed to be 300 Acres, after the Estimation of 18 Foot and an half to the Pole, at the Rate of 100*l.* for every Acre, and had paid 2500*l.* that the said Sir B. H. and H. F. should appoint Two Measurers, the one at the Election of H. F. the other at the Election of B. H. to measure it before the 31st Day of January; and if there appeared to be more Acres at the Measuring than the 2500*l.* amounted to that Sir B. H. should pay as much as should be more before such a Day; and if the Acres did

## The Law of Covenants.

not amount to so much as he had paid, that then *H. F.* and *Goates* should pay so much as should be wanting before the 31st Day of *May*. And he alledged in *facto*, That he nominated such a Measurer, and that *H. F.* would not appoint any before the 3d of *January*; that the said Measurer justly measured it, and that there was wanting 70 Acres, which amounted to 750*l.* and that he, being required such a Day, did not pay it. Defendant takes Issue, That there did not want any Acres to amount to the Sum of 2500*l.* and found pro Quer<sup>d</sup> Dammage 400*l.* Excepted, that *Goates* being a Stranger to the Measuring, ought to have Notice that so much was wanting before the Day of Payment, and no Request is alledged till Dec. 10 *Jac.* which is long after the Day of Payment was past. *Sed Cur'*, He being privy to the Covenant, ought to take Notice of the Admeasurement as well as the Plaintiff, and might have been present at the Measuring; and though *H. F.* (and not *Goates*) was to appoint the Measurer, and did not do it, it was his Default, and they are both Parties to the Covenant.

**Notice on Covenant not to be so strict as on Obligation.** Also, in Point of Covenant, Notice is not to be given so strictly as upon an Obligation, which is in Point of Forfeiture. Judgment was assigned on Error. *Crok. Jac.* 390. *Sir Baptist Hicks versus Goates.* 1 *Roll. Rep.* 314. *Godb. 192. Vids* such-like *Cale,* *Gr. Jac.* 472. *Burwell & Wood.*

*Monstre.*

*Monstre. Oyer. Vide infra, Tit. Bonds for Performance of Covenants.*

In Action of Covenant the Defendant demands no *Oyer*, but pleads, *Quod in Articulis illis ulterius continuetur*. It's ill; and his shewing the Counterpart is not sufficient, but the whole Indenture ought to be brought into Court. *1 Keb. 513. Preyland and Cooper.*

The Defendant now cannot pray *Oyer* as heretofore, but must plead to the Indenture, and produce it to the Court. *1 Keb. 104.* But it's laid in *Ventr.* If the Defendant pleads Performance without demanding *Oyer*, it is a good Cause of Demurrer. *1 Ventr. 37. Q.*

Debt on Bond to perform Covenants, Defendant craves *Oyer* of the Bond, and then *Oyer* of the Condition, which was to perform Covenants made between the Plaintiff and the Intestate of the Defendant; and after *Oyer* of the Condition, the Entry on the Roll was, that the Defendant prayed *Oyer* of the Indenture mentioned in the Condition, which was not brought into Court, *Et ei Legitur in hæc verba*, This Indenture, &c. and sets out the entire Indenture in English. *Per Cur'.* Upon general Demurrer it shall be intended to be the true Indenture, and that it is in Court, although it doth not so appear by the Record. But the Court agreed in this, That the Defendant ought to have shewed the Deed, and not the Plaintiff by the Law; though the Court shall sometimes compel the Plaintiff to give a Copy of the Indenture, because the Defendant swears he hath no Part, or that it is lost. *1 Sound. 8, 9. Frevens and Harridge.*

## The Law of Covenants.

Misentry amended upon Oyer.

Plaintiff declared on a Deed, dated the 30th of January: Defendant demanded *Oyer*, and the Date thereupon was by Indenture of another Date. This Misentry may be amended, being only upon *Oyer*, which is the Act of the Court. *Aliter*, Had it been on a Deed so pleaded, it may be amended in another Term, being only a false Recital by the Court. *1 Keb. 101.*

In Debt on Bond, upon *Oyer* of the Condition the Defendant pleads Performance generally, it is not good, unless he shews the Deed and pleads it. *Vid. 1 Sid. 50.*

In Debt on Bond, Defendant demands *Oyer* of the Condition, which was to perform Covenants in an Indenture, and then pleads Performance generally without shewing of the Indenture; and Demurrer general upon it, and adjudged *pro Quer'*. *1 Sid. 425.*

Debt on Bond to perform Covenants in an Indenture: Defendant pleads, that there was no Covenant contained in the Indenture on his Part to be performed. The Plaintiff demands *Oyer* of the Indenture, which is entered *verbatim*, and then demurs, which he could not well do before the Entry of it, whereby it becomes Part of the Bar; so the Cause of the Demur-  
rer appears. It was alledged by *Sanders*, whose Hand was to the Plea, That the Plaintiff could not have Judgment, because no Breach was al-  
leged. The Court was offended with him, and they held the Plea in Bar merely for Del-  
ay, and advised by him against the Statute of  
*W. I. 1 Ventr. 43.*

In Trespass a Man justifies the taking of Four Ashes, &c. as several which *Licetum foret* for the said Lessees and their Assignes, to take up-  
on the Premisses necessary Fireboot, House-  
boot,

boot, &c. and for necessary Reparations. It was thereupon demurred, because he justifies by Force of a Covenant in an Indenture, and doth not shew the Indenture, it being a Thing which cannot be granted without Deed. *Per Cur'*, The Plea is ill: For the Servant's justifying under the Interest of his Master, and meddling with the Title, ought to shew the Deed; for it is the Substance of the Title, and without shewing it he cannot justify: And it is his Folly to justify under one who either would not, or could not shew the Deed. *Cro. Jac. 291. Purfrey and Gryme.*

Declaration, That the Plaintiff covenants to serve the Defendant Six Years; and that the Defendant covenants to pay the Plaintiff 8*3 l.* for every Year *Quarternatim*, (*viz.*) 20*l.* 15*s.* at *Michaelmas*, 20*l.* at *Lady-Day*, 20*l.* 15*s.* at *Midsummer*, and 20*l.* 15*s.* at *Christmas*; and assigns a Breach in the Non-payment of the whole. Defendant demands *Oyer* of the Indenture, which was enter'd as aforesaid, saving that under the [*viz.*] it was 20*l.* at *Michaelmas*, and 20*l.* 15*s.* at *Lady-Day*. Issue was taken, that the Plaintiff did not serve the Defendant. Verdict and Judgment *pro Quer'*. Error assigned in the Variance of the Sums in the Declaration and the Indenture; also all the Particulars do not amount to 8*3 l.* but 15*s.* short of it; also without the Particulars under the [*scilicet*] it does not appear how much shall be paid at one Day, and how much at another, and it is not said, *Quarternatim per aequales portiones*. *Per Cur'*, *Quarternatim* shall supply all this after a Verdict, and the Variance under the [*scilicet*] shall not hurt, for *Quarternatim* shall be intended the usual Quarter-Days, and that the Payments should be by equal Portion: And although there is not

Covenant and 8*s.l.* due, but it appears 15*s.* less was due, yet demand more for that the Jury have not given less than was due. The Demand of more shall not hurt, though in some Cases the Demand of less than is due shall hurt. 2 *Lev.* 99. *Venaston* and *Mackarty.*

Declares *ad-  
buc, &c.* which  
refers to a  
Time after  
the Original,  
and yet good.

Covenant in a Lease, that he shall enjoy it in C. B. Breach assigned, that the Defendant had erected another Messuage *tam proper'*; his Lights were *magnopere tenebrat' & adbuc existunt.* Verdict pro *Quer'.* Moved in Arrest, that *adbuc existunt* refer to the Time of the Declaration; and so Dammages given for a Thing which is after the Original, which is 15 Days at least before the Declaration. But *per Cur'*, Perhaps the Defendant appeared *gratis* without any Original, and then the Action commenceth by the Declaration, and the Recital of the *Summonitus* in the Declaration is but Form. And in Debt on Bond the Declaration is *summonit', &c.* and the Declaration *nondum solvit, &c.* & *adbuc contradicit unde dicit, &c.* quod *damnum habet*, where the Words are in the Present Tense, and the Dammages generally, as here; so in Assessment and other Actions, and yet held always good. 3 *Lev.* 246. *Hart and Bartom.*

### Declaration.

*Testatum exi-  
git, where  
good or not.*

Whereas by Indenture, bearing Date, &c. between the Plaintiff and the Testator of the Defendant; *Testatum existit*, that the Plaintiff demised such a Messuage, &c. and saith not expressly that *dimit' & convenit*; and it was held by the Court to be good enough. Cr. *Car.* 188. And the usual Course in B. R. is to declare in this Manner, that by such an Indenture *Testa-*

*cum existit.* 2 Keb. 79. *Onslow and Ansley*, in which Case it is agreed it a good Affirmative: And in 2 Keb. 94. *Horneck and Sanderson*, it is said, If the Indenture be set forth by a *Testatum existit*, in Debt on the Indenture, or in a Plea in Bar, it's naught. *Alii* in Covenant. *Vid. Wilson and Jeffrey's Case.* Cr. El. 195. The Prothonotary certified, that it was the common Course. In Debt for Rent, *Quod cum per Indentur testatum existit*, is ill; but in Covenant, or Debt on Bond to perform Covenants, such Declaration is good. 2 Keb. 383. *Coquer cont' Crine.*

In Action of Covenant to pay 4*l.* per *Ann.* during the Life of *A. T.* the Count was, *Cum per quoddam scriptum sigillat, per quod Testatum existit*; which *per Cur'*, is well enough after a Verdict. Some said, the *Per quod* ought to be omitted; but *per Cur'*, it is one and the same Sense. 1 Sid. 375. 2 Keb. 400. *Stephenson's Case.*

In Covenant Plaintiff, declares that the Defendant *per scriptum Articulor' convenit*, and saith not *sigillo* (Def') *sigillat*, it is not good; *Per Scriptum*, for it shall not be intended *factum* without and saith not sealing. Cr. El. 571. *Southwell and Brown.* *Un- sigillo sigillat.* core vid. 1 Vent. 70.

The Addition of a Person in the Covenant, who is no Party to the Deed, is idle, and he ought to be omitted out of the Declaration: So if the Covenant has insensible Words, those *Breach to be only which are sensible* ought to be recited, *laid in the sensible Words.* and the Breach to be laid therein. Cr. Fac. 358. *Goodman and Knight.* So of an insensible Obligation. 3 Lev. 21, 22.

Declaration on Covenant in Indenture, which recites *quod cum per Indenturam testatum Testatum existit*; *Per Cur'*, It's good, and the Diversity is *bit.*

where

## The Law of Covenants.

where it is by Way of Declaration, and where by Way of Bar or Replication; for in the Declaration, *Testatum existit* is sufficient to induce the Action, and to assign the Breach. *Cro. Jac. 537. Bullivant and Holman.*

Covenant with the Master of a Ship to pay Primage, and avers he did not pay it, but saith not in his Declaration what that is, yet good. *Latch. p. 50.*

In Debt on Bond, conditioned to seal a Deed, and perform the Covenants, he pleads he did seal the Deed, and perform the Covenants; he must set the Covenants forth, that the Court may judge of their Sufficiency. *2 Keb. 849. Biscow and Mountague.*

Two Exceptions were taken to a Declaration in Covenant.

1. The Covenant is, That the Plaintiff and his Wife shall enjoy certain Farms; and the Breach is assigned, that the Defendant entered upon the Plaintiff into the said Farms. *Per Coke, This is good enough.*

2. It is, *Quod licet ipse perimperavit* all Covenants on his Part, and the Defendant had not performed his Covenants. This *Licet* is not good without a *Tamen*, *Licet* not being any direct Affirmative: But Judgment *pro Quer.* *1 Roll. Rep. 267. Pemberton and Plait.*

Defendant covenanted, he was seized in Fee, &c. and would free from Incumbrances, and in it there was a Covenant for quiet Enjoyment; and the Breach assigned was upon Entry and Eviction by another, and concludes, *& sic conventionem suam prædictam infregit*, in the singular Number, and doth not shew in what Covenant in particular. But per *Car.* *Conventio* is *nomen Collectivum*; and if Twenty Breaches be assigned, he still counts in *Placito quod teneat ei con-*  
*ven-*

*Licet, and  
faith not Tamen.*

*Conventio no-  
m. n collecti-  
vum.*

ventionem inter eos fact'. And the Breach being of all the Covenants, the Recovery in one would be a good Bar in Action afterwards to be brought upon either of these Covenants.

*2 Mod. 311. After and Mazein. Devant.*

Plaintiff declares, That it was agreed between him and the Defendant, that the Plaintiff for 1200*l.* should demise certain Lands to the Defendant for a Term of Years, & quod scribi & ingrossari fecit quandam Indentur' bargainie & vendition' per quam mentionat' fuit, quod demisit the Lands to the Defendant for the Term, quam guidem Indent' ipse sigillavit & deliberavit ut fact' sum' virtute cuius ac vigore Stat'. The Defendant was possessed, but had not paid the Money : The Defendant demurs upon this Declaration, for the Lease is alledged only by Way of Recitement. But per Cur', The Pleading is as good as if he had said, Quod per Indentur' dimisisset. Sir Tho. Jones 24. Harris and Hillesley.

Debt on Bond, conditioned for Performance of Covenants in quadam Indentura hic in Cur' prolat'; and in Truth the Deed was not indented, but was written, hæc Indentura facta: In quendam Indentura; but Per Cur', It is not any Indenture, though there be Two Parts thereof, and adjudged contra Deft'. *In quendam Indentura; but Per Cur'*, It is not indented.

*Cro. El. 472. Frampton and Stiles, 5 Rep. 20. b.*

One declares in Covenant, That the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel, and other Necessaries. It's ill, because he doth not shew in particular what other Thing were necessary. *Cro. Fac. 486. Mills and Astell.* Covenant to find Meat, &c. and other Necessaries, and shew not what they are.

Covenant to pay so much Money into the Exchequer; and Error was, because he had not set forth in what County the Exchequer is. *Stiles, p. 59. Teach and Clethero, Iffit de Chancery & Bank le Roy, Moor 176.*

The

Affinee;

The Plaintiff brings Action of Covenant as Affinee, and doth not name himself Affinee (but after, in the Declaration, shews how he is Affinee); it's good enough, especially after a Verdict. *Cro. El.* 823. *White and Ever.*

Indenture  
mistaken as to  
Parties.

The Plaintiff declares, by Indenture between the Defendant and *A.* it was covenanted, and upon *Oyer* there were Three, *A. B.* and the Defendant; it's ill. *Latch.* p. 50. *Constable and Clobery.*

Covenant in some Cases is pursued strictly: The Plaintiff declares, That the Defendant covenanted to take the Plaintiff for Clerk, and to allow him 2*s.* for every Quire of Paper he should copy out. The Breach is assigned, that he copied out a Bill containing Four Quires and Three Sheets, for which 8*s. 3 d.* was due. And Judgment was reversed, because there could be no Apportionment in this Case; it was 2*s. per Quire*, but not *pro Rata*. *Allen* p. 19. *Needler and Guest. Dalt.*

Debt for 1000*l.* on Deed of Charter-party; it appears not by the Plaintiff's Declaration that the Defendant is indebted to the Plaintiff, but only he saith, He is indebted as it appears, but shews not how. *Per Cur'*, It is by Indenture, and well enough. *Dyer* 148. *Plo.* 121, 122. *Stiles's Rep.* 133. *Freber's Case.* Either an Action of Debt or Charter-party lies here, for it is on a Charter-party. Here is not indeed a perfect Allegation, yet it is usually thus pleaded.

That the De-  
fendant is in-  
debted as ap-  
pears, but  
shews not  
how.

Defendant covenants, Whereas the King had granted the Office of *Aulnegeor* to the Duke of *Lenox*, who had made the Plaintiff his Deputy for Seven Years of all the Places in *Essex* (except *Colchester*); that the Defendant covenanted, Whereas the said Duke of

*Lenox*

Lenox had made a Deputation of that Office in Colchester for Two Years to E. that at the End of the Two Years he would procure to them a Deputation for Seven Years in the same Manner that E. had it, *proviso* that they, upon the making thereof, should give Security for Payment of 100*l.* per Ann. And they alledged in *facto*, that they were always ready to give Security for the Rent, and that the Defendant had not procured the Deputation. Defendant demurs. *Per Cur'*, The Declaration is good: It is enough they have alledged a Readiness to give Security, and they need not shew they required a Deputation to be made as the other was, or indeed that any Deputation was made to E. The Covenant mentions a Deputation, and he is estoxt to say the contrary, and he ought at his Peril to procure to the Plaintiffs such a one as that was. Neither need they shew the Breach according to the usual Form, *Et sic non tenuit conventionem in hoc*, for there was a *Sic non tenuit conventionem in hoc*.  
 Breach sufficiently alledged. Cr. Jac. 297.  
*Barwycke and Gibson.*

Plaintiff declared, he made the Lease to the Defendant the 28th of May, and that afterwards, *scil'* the 27th of the same Month, he broke the Covenant. *Per Cur'*, Where the *Postea* and *Sci-*  
*licet repug-*  
*nant.* *Postea & Sci-*  
*licet repug-*  
*nant.* good to signifie the Time of the Covenant broken, and the *Scilicet* shall be void. *Stiles Rep.* 45.

Charter-party between B. Owner of a Ship, and L. and M. Merchants, Freighters of a Ship; B. puts to freight to them the Ship in a Voyage to Guinea at 48*l.* per Month: Then there is a Covenant for the Payment of the Freight, *viz.* when the Ship arrives at Guinea, the Freight then due was, upon Notice of it, to be paid in England, and the Residue when she arrives in England:

*England*: And saith, that at such Time the Ship arrived at *Guinea*. Six Months and Ten Days were then past, which comes to so much, and Notice thereof given; and that after such a Time the Ship arrived into *England*, and that the Freight for Six Months of the Time of the last Payment came to 287*l.* 4*s.* and the Defendant had not paid any of the Sums. It was excepted to the Declaration: It appears upon Computation, that the Plaintiff demanded more upon the first Breach than is due by 30*s.* and less than is due upon the second Breach by 16*s.* and though the first may be cured by the Jury's finding less, or by the Plaintiff's releasing the Overplus, yet where the Demand is less than is due, this is a Fault incurable. *Hale* makes a Difference between this Case of Covenant and Debt; and held, that after Verdict it had been cured without Question, although upon Demurrer there may be some Doubt, the Demurrer being general, but upon special Demurrer it had been ill. And Judgment *pro Quo*, and said, the Defendant may move this in Arrest Judgment after the Writ of Enquiry, if he would. 2 *Lev.* 56. *Bolton and Lee*, & 3 *Keeble* 39.

Demand of  
less than is  
due.

#### Variance between the Deed and the Declaration.

Plaintiff declares by Indenture dated the 7th of Sept. 1657. whereby the Defendant covenants, that he and one *T.W.* would deliver to the Plaintiff so many Maunds of *Salt-peire* at such a Rate before the 20th Day of October ensuing, the Plaintiff paying so much a Maund; and to the Performance thereof the Defendant binds himself in 500*l.* Defendant demands *Oyer*, and it appears between the Covenant and the Obligation there is a *Proviso*, That if the

the Defendant should between that and the said 20th Day of October be disabled by Sea, &c. to deliver the said Salt-petre, that the Deed should be void; and pleads, that he, within the Time aforesaid, had prepared 1000 Maunds of Salt-petre, and that the Boat wherein it was put was cast away, and so he was disabled. Plaintiff replies, the Defendant had sufficient Salt-petre over and above what was cast away. And upon Issue found for the Plaintiff, and 300*l.* Dammages, it was moved in Arrest of Judgment, that there was a Variance between the Deed and the Declaration, for in the Declaration the *Proviso* is omitted. But *per Cur'*, 1. The Action is brought upon the Covenant, and not upon the Penalty, and the reciting of the Penalty is but Surplus. 2. The Declaration is sufficient without Recital of the *Proviso*, according to *Ughtred's Case*, and the Defendant ought to plead the *Proviso*. *Raym.* 65. *Elicot and Blake.* 1 *Keb.* 424, 426. *mesme Case.* 1 *Lev.* 88. *mesme Case.* *Vid.* *sub Tit.* *Excuse.*

Where a Declaration is sufficient without reciting a *Proviso* in the Articles.

As to Variance between the Count and the Deed, the Issue may help it as in this Case: The Action is founded on the Covenant to deliver Salt-petre at a Day; and on Oyer it mentions such a Covenant, but further giveth Liberty, that if the Defendant by Act of God be disabled, that then he should not pay; which is well, the Action not being founded on the Penalty, but only in the Breach of the Covenant in not delivering: (This was in Arrest of Judgment, and not on Demurrer on Oyer for Variance.) Also the Plaintiff hath here agreed the Deed to be the same; but if he had pleaded *non est factum*, he might have had Advantage of the Variance. The Count is of a Bond dated the 1st of May, and the Entry is of the 2d of May,

In what Cases Issue shall help Variance between the Count and the Deed.

on

on Release pleaded, and Issue upon it, it is good enough: And here in the principal Case, the Issue was on the Disability. 1 Keb. 426. *Billage and Blake.*

10 Variance between the Indenture and the Declaration shall not stay Judgment after a Verdict. 1 Sid. 49. *Pey's and Waters.* 1 Keb. 126.

11 By Agreement between the Plaintiff and the Testator of the Defendant, a Parcel of Land was to be sold for 400*l.* but if it did not arise to so much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Testator covenant ed for himself and his Executors to pay his Proportion to the Plaintiffs, so as the Plaintiff gave him Notice in Writing by the Space of Ten Days, but saith not such Notice was to be given to his Executors or Administrators. On Oyer of the Indenture there was a Variance between the Covenant, which was for Notice to be given to the Testator, and this Declaration, whereby Notice is averred to be given to the Executors, and a Demurrer on it; but *per Cur'*, this is no material Variance, because this Covenant runs in Interest and Charge, and so the Executor is bound to pay, and therefore it is necessary he should have Notice. 2 Mod. 268. *Harwood and Hilliard.*

Variance in Point of Notice.

Assignavit for Transpositus.

The Covenant was, That he will assure, convey, and assign a Lease: The Defendant pleads Performance. The Plaintiff assigned the Breach *Quod non assuravit, conveyavit, & transpositus* [Anglice, set over]. And the Defendant pleaded, *Quod assuravit, conveyavit & assignavit*, [Anglice, set over;] and the Word *Transpositus* is not in the Covenant, nor in the Pleading for Performance thereof. It is an Issue misjoin'd. 2 Leon. p 116. *Gray and Constable.*

In Debt on a Bond of Performance, *J.* and *A.* were named in the Bond; but the Indentures as pleaded, were only betwixt *J.* of the one Part, and the Defendant of the other, but were *revera* betwixt *J.* and *A.* on the one Variance is, Part, and the Defendant on the other. *Per to Parties.*  
*Cur'*, It is a Variance, and Judgment *pro Quer'.*

1 Feb. 127, 167. *Pavie and Hall.*

Declaration is, That the Defendant and one *Agnes Knight*, by such an Indenture bargained, sold and enfeoffed the Plaintiff of Lands in Fee, reciting that *Robert Knight* by his Will in Writing devised these Lands unto him in Fee; and that the said *Will. Knight* covenanted with the Plaintiff, that he and the said *Agnes*, *tunc bauerunt virtute predict' ultime voluntatis plenam potestatem bonum jus & legitimam autoritatem*, to alien and sell the Lands to the Plaintiff in Fee, and assign the Breach that *Robert Knight* died seised of the said Lands, and made not any Will, whereby the Lands descended to *John Knight* the Heir, who enter'd, &c. And Defendant demanded *Oyer* of the Indenture; upon which the Defendant demurred generally, because the Declaration varies from the Indenture, (*viz.*) the Covenant is in this Manner; *And whereas the said Thomas Knight and William Knight (whereas Thomas was not Party to the Indenture, nor sealed the same) do covenant for them and their Heirs to and with the Plaintiff, That they the said William Knight and Agnes now have, his Heirs and Assigns, by Force and Virtue of the said Will, do own full Power, good Right, and lawful Authority, to alien, &c.* for the Covenant as it is in the Indenture is void and insensible. But *per Cur'*, The Declaration is good; for the Addition of *Thomas Knight* in the Covenant is idle, he being no Party to the

Omission of  
the Name of  
one who is no  
Party, good.

Reciting  
the sensible  
Words, and  
leaving out  
the insensible.

Amendment  
in another  
Term.

Indenture, and therefore the Omission of him in the Declaration is as it ought to be: Also the Words in the Covenant, [his Heirs and Assignes by Force, &c. do own, &c. being insensible], the Party in the Declaration omitting them, and reciting the Covenant in that which is sensible, and laying the Breach therein, is good enough. Cr. Jac. 358, 359. Goodman and Knight. Dev.

In Action of Covenant *queritur de Deft'*, not said in *Custod' Mareschalli*; and *Bigland* excepted, that in another Term this is not amendable after Demurrer. *Sed per Cur'*, Bail being since filed right, it was amended, this being no Part of the Declaration; and so resolved in the Case of *Seaman and Dee*. 3 Keb. 452. *Talbot and Wright*.

**CHAP.**

## C H A P. XL.

*Breaches as to Suits in Law.*

**C**ovenant that he shall not be aiding or assisting to *E.* in any Action to be prosecuted against *L.* the Covenantor; and after the Covenantor joins in a Writ of Error with *E.* and another against *L.* upon a Judgment on <sup>Bringing a</sup> *Trespass* against them Three, which is apparently erroneous: This is not any Breach of the Condition, for it is not properly an Action, but a Suit to discharge him of a tortious Judgment, in which they ought all to join. *Hill.* 17 *Fac. B. Lamb and Tompson.*

If Lessor covenants with his Lessee for Years, that he shall quietly and peaceably enjoy the Land, without Impediment and Disturbance of the Lessor, &c. and after the Lessor exhibits his Bill in Chancery against the Lessee, supposing that this Lease was made in Trust for certain Purposes; but there was a Decree against the Lessor. This is not any Breach of the Covenant, for that the Chancery had nothing to do to meddle with the Possession, but only with the Person: And this Suit stands with the Covenant, viz. the Trust. *Tr. 12 Fac. 11 B. Selby and Shute.*

In Raym. Hunt and Danvers's Case, 370, 371. a Suit in Chancery, or in the Exchequer Chamber, is a Disturbance contrary to Shute and Selby's Case, *Moor* 859, 1179. *1 Roll. Abr.* 43. *1 Brownl.* 23. *vid. Winch Entry* 116. it appears Judgment was given for the Plaintiff; and Winch was one of the Judges that gave Judgment, and he should better know than any

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that reported the Case: And as to 3 Leon. 71. the Suit was there by a Lessee against a Stranger, and so the Lessee could not be disturbed thereby. But by Raym. I take such a Suit not to be a Breach of Covenant against Incumbrances, because a Decree is no Incumbrance upon the Land, but a Molestation to the Person.

Three Breaches are laid by Three Entries by the Lessor against his Covenant; and as to one the Plaintiff is barred, he may not have Judgment for the rest. *Pal. 110. Roberts and Stoker.*

### *Outlawry pleaded in Bar.*

Declaration on Indenture of Demise made to the Testator of the Defendant by Baron and Feme, Plaintiffs of the Wives Land:

**First Breach, That the Rent reserved was in Arrear.**

**Second, The House out of Repair.**

**Third, That the Testator had eradicated certain Trees.**

Bar by Outlawry of the Husband, Plaintiff, in *B. C.* Judgment on Demurrer as to all the Breaches; for that the Damages to be recovered, for the Breach of the Covenant for Repairs were not forfeit by the Outlawry. It's an entire Plea to all the Causes of Action; and as to the Damages for not repairing, these are no more forfeitable by the Outlawry than Damage for a Battery, or other Trespass; and then the Plea being entire and ill in part, it's ill in all, as well in this Case as in others. *Lut. 1513.*

What not forfeitable by Outlawry.

The

The Covenant was, If the Defendant sued or troubled, charged or vexed the Plaintiff; *Per Cur'*, A Suit in Chancery is within the Condition. 2 Keb. 288. Ashton and Martin.

The Defendant lets an House to the Plaintiff, and covenanted he should quietly enjoy it without any Manner of Molestation or Disturbance: He enter'd, and some Time afterward the Defendant exhibited a Bill in Chancery against the Plaintiff, wherein he charged the Plaintiff with ploughing of Meadows, and committing Waste, and obtained an Injunction, whereby he was interrupted in his ploughing, and afterwards the Bill was dismis'd with 20*l.*

*Costs.* *Per Cur'*, The Suit in Chancery is not Suit in Chancery not relating to the Title or Pos-  
session. The Suit in Chancery is not touching the Lessee's Estate or Title, but for Waste which he ought not to do; and though the Suit was groundless, yet it not relating to his Title or Possession, it is no Breach. 2 Vent.

213. Morgan and Hunt. Popb. 205. If one be possessed of Lands by Force of an Extent, and by a Decree in a Court of Equity he is forced to pay a Rent out of the Land, this shall not be a legal Eviction or Recovery for so much; cited in 2 Vent. 213.

Lessor covenants with his Lessee, that the Lessee should enjoy the Land demised without any lawful Eviction; and afterward, upon a Suit in Chancery by a Stranger against the Lessor for the Land, the Chancellor decreed that the Lessor should have the Land. This Decree is not a lawful Eviction by which the Covenant is broken; for tho' in Conscience it be *equum* a lawful Eviction. Decree in Chancery not a lawful Eviction.

that the Stranger have the Possession, yet the same is not by Reason of any Right Paramount the Title of the Lessor which was in the Stranger, 3 Leon. 71. So 1 Brownl. 23. Such Suit in Chancery is no Breach, being no Disturbance at

Common Law nor Entry; yet *vid. Raym.*  
371.

Action of Covenant to save harmless from Suits and lawful Evictions. Defendant pleads Performance. Plaintiff replies, That *J. S.* took out a Writ by *Hab' fac' Possessionem* out of *B. R.* *debito modo Execut'*, and by Virtue thereof enter'd on the Possession of the Plaintiff, and did expel and amove him: Defendant demurs. Judgment *pro Deft'*. *Debito modo* is not sufficient without shewing Particulars; as in Debt for Rent, to say, *A.* did demand *debito modo*, is ill. 1 Keb. 279. *Nicholls & Pullen.* & 1 Lev. 83.

*Debito modo,*  
where ill in  
pleading.

*Lee* brought Covenant against *Maddox* and *Isabel* his Wife. Plaintiff declared, That one *Errington*, the first Husband of *Isabel*, was indebted to the Plaintiff in 20*l.* and that one *Ashley* was indebted to the said *Errington* in the like Sum of 20*l.* *Errington* made *Isabel* Executrix, and died. *Isabel* by Indenture *Dum sola* made the Plaintiff a Letter of Attorney to sue and recover against *Ashley*; and covenanted, *Quod ipsa ad requisitionem querentis de tempore in tempus adjuvareret & manuteneret quamlibet, & omnes sectam & sectas, quam veliquas dict' (Quer?) commensaret & prosequeretur in nomine dict' Isabelli*, to the Use of the Plaintiff, *non existendo, Nonsuit, voluntarie, or making any Discontinuance, Release, Countermand, &c.* without the Assent of the Plaintiff: And declares further, That the Plaintiff had brought a Suit against the said *Ashley* for the said Debt; that the said *Isabel* depending the said Suit, had married the Defendant without the Assent of the Plaintiff. The *Quare* was, *Marriage is a* *If by this Marriage the Suit be countermanded?* *Countermand Per Cur'*, Here is not any Countermand, for *of Suit,* *by the taking the Husband the Writ is not aba-*

## The Law of Covenants.

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ted, but only abateable; therefore the Plaintiff ought to have shewed, that by the taking of the Husband the Writ by Judgment was abated, otherwise it is no Countermand, and so no Cause of Action. But the Declaration is not sufficient, because there is not any Request laid; and the Plaintiff ought to have notified to *Isabel*, that he had commenced such Suit. *Q. de hoc*, 1 *Leon.* 168, 169.

Defendant let for Six Years; and covenant-ed, That Lessor should enjoy it during the Term quietly without Interruption, and dis-charged from Tythes and all other Duties; and after the Term expired, the Parson sued him for Tythes. *Per Cur'*, This Suit after the De-termination of the Term was a Breach of Co-venant; but because it was not alledged that the Suit was lawful, or that the Tythes were due (for he was not bound to discharge him from illegal Suits) the Breach was not well assigned. Cr. El. 916. *Lovering's Case.*

*Le and Ma. 3  
dox.*

Where a Suit  
after the De-  
termination  
of a Term is  
a Breach of  
Covenant.

### Breach by Disability.

Declaration, That the Defendant by Inden-ture 1659, reciting that there was a Lease made to the Defendant, and a Recognizance acknow-ledged by *H. R.* to the Defendant, bearing Date with the said Indenture; the Defendant covenanted, that if *H. R.* pay to the Defen-dant such a Sum the 24th of June 1660, then the said Recognizance should be void; and the Defendant at the Costs, &c. would regrant the Indenture, and deliver the said Recognizance to be cancelled. Plaintiff assigns for Breach, that the 21st of October 1659, the Defendant pro-secuted an Extent upon the Recognizance. *Per Cur'*, Here is a present Breach, for the

Disability  
by prosecu-  
ting an Ex-  
tent.

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Defendant hath disabled himself to deliver up the Recognizance. *5 Cok. 20.* Sir *Anthony Maine's Case.* *3 Cr. Eliz. 450.* & *Popb. 109.* *Idem Casus.* *Roym. 25.* *Robinson and Amps.* *1 Keb. 103.* *1 Sid. 48.* *Mesme Case.* *Vid. 1 Keb. 103,* *118.*

If a Day be limited to perform a Covenant, if the Covenantor once disable himself to perform it, though he be enabled afterwards before the Day, yet the Covenant is broken, as was Sir *Anthony Maine's Case.* *5 Rep. 20. b. Pop. 109.* *Bendl. N° 121, 125.* Sir *Anthony Maine* demiseth Land to *Scott* for Twenty one Years, and covenants that at any Time during the Life of *Scott*, upon Surrender of his Lease, to make a new Lease, &c. and gave an Obligation to perform the Covenants. Sir *Anthony Maine* pleads in Debt upon this Obligation, that *Scott* did not surrender. *Scott* replies, That after the said Demise, Sir *Anthony Maine* had accepted a Fine, *sur conissance de droit come ceo, &c.* and by the said Fine grants and renders the Land to the Conisee for 80 Years. Defendant demurs. *Per Cur'*, 1. Sir *Anthony* by the Fine levied had disabled himself either to take a Surrender, or to make a new Lease, and so has broken his Covenant. 2. Though the first Act was to be done by *Scott*, *viz.* the Surrender, and *Scott* may surrender (if the Term of 80 Years be the Interest of a future Term), yet *Scott* shall have his Action without making any Surrender; for after Surrender Sir *Anthony* cannot make a new Lease, which is the Effect of the Surrender, for he hath disabled himself.

So if he disable himself to perform it in the same Plight, Feoffee covenants to reinseoff, and he grants a Rent Charge, marries a Wife, &c. This is a Breach of the Condition.

One

One covenants to perform an Award, which is, That he shall after deliver an Obligation to another, in which he is bound to him, without limiting any Time when this shall be performed. If he bring Debt on the Bond and recover, and after deliver the Obligation; yet this is not any Performance, for he ought to deliver it as it was at the Time of the Award made. *1 Roll Abr. 447. Nicolls and Thomas.* It is a general Rule in Conditions and Covenants, *That if the Plaintiff himself be the Cause of Dis- ablement, so as the Condition or Covenant cannot be performed, he shall not take Advantage of the Con- dition or Covenant.* Godb. 74. As if I be boun- den to pay a Pension to one till he be promo- ted to a Benefice, and he disabiles himself to take the Benefice, I shall no longer pay the Pension. Godb. 76.

Regula.

*Where Breach must be assigned according to the Words of the Covenant.*

A Man covenants upon Payment of 10*l.* by *J. S.* that *J. S.* shall have so many Tuns of Copperas, and shall enjoy it without lawful Di- sturbance of any Person. *J. S.* brought Co- venant, and shews the Payment of the 10*l.* but that he was interrupted and disturbed in the Enjoyment of the said Copperas. The Breach is not well assigned, because he doth not shew by whom he was disturbed, nor that he was *Legitimo modo*, disturbed according to the very Words of the Covenant; for though the Plaintiff in Covenant need not shew in special the Title by which he is disturbed, be- cause by Presumption he may not know, yet in assigning the Breach he ought to pursue the pursued in the Words of the Covenant. *Yelv. 30. Chaund- flower*

Disturbance,  
not saying by  
whom.

Where the  
Words of the  
Covenant  
ought to be  
assigned the  
Breach.

*flower and Preistley, &c; 3 Cro. El. 914. 2 Cr. 315.  
Pl. 17.*

Debt on Bond to perform Covenants; one of which was, That the Defendant covenanted that he was seised of an indefeasible Estate in Fee simple. Defendant pleads Covenants performed. Plaintiff replies, He was not seised of an indefeasible Estate in Fee-simple. Defendant demurs generally, because he supposed the Plaintiff ought to have shewed of what Estate the Defendant was seised, in regard that he had departed with all his Writings concerning the Land in Presumption of Law, and therefore the Plaintiff well knew the Title. And it is not like to Bradshaw's Case; for there the Covenant was with the Lessee for Years, who had not the Writings. But *per Cur'*, The Breach was well assigned according to the Words of the Covenant, and the Plaintiff had Judgment. *Raym. 14. Gliminster and Audley.*

*Breach may be well assigned, though not directly within the Words.*

By Covenant in a Charterparty the Parties mutually covenant, That the Master of the Ship (who was the Plaintiff) should pay Two Parts of the Port Charges, and the Factor of the Defendant the Third, for all the Voyage. In Action of Covenant the Plaintiff shewed, That he sailed from London to Cadiz, and there he paid all the Port Charges, and the Two Parts for himself, and the other Part for the Defendant; and that the Defendant had not repaid his Part. After Judgment, by *nihil dicit*, and a Writ of Enquiry of Damages returned, Two Exceptions were taken: 1, That here is

not

not a sufficient Breach, for the Defendant was not bound by the Covenant to pay to the Plaintiff the said Third Part; but to the Collector of the Port Charges; and therefore he ought to have shewed, that the Defendant had not paid his Third Part, *sed non alloc'*; for when it is averred that the Plaintiff had paid the Third Part, it shall be intended the Defendant had not paid it, and the Plaintiff was necessitated in his Default to pay all, otherwise the Ship should have been stay'd in the Port.

Payment to  
one, and not  
to another  
within the In-  
tent.

2. It was not alledged, that the Port Charges paid by the Plaintiff were paid in this Voyage. *Per Cur'*, It shall be intended to be the same Voyage for Payment in the same Ports where the said Voyage was alledged to be made. *Sir Tho. Jones 186. Bellamy and Russell.*

In Covenant between *Griffith and Goodhand* a Brewer, declaring that the Defendant covenanted with the Plaintiff that he should have all the Grains out of the Brase that he should brew for Ale and Beer, Seven Parts of Eight, paying a certain Rate for them, *viz.* so much for the Grains of Beer, and so much for the Grains of Ale: And amongst other Breaches, shews that the Defendant *callide & subdole* to defraud the Plaintiff of the Benefit of the said Contract, had mixed Hops with the Brase Malt that he brewed, so that the Grains became bitter and unserviceable for Fodder for his Cows, *& sic infregit*. Upon *non infregit* pleaded, Verdict *pro Quer'*, and moved in Arrest, that the Breach was not well assigned; for it was said, That the Grains were delivered, and altho' the Defendant had done ill in mingling Hops with the Brase, an Action on the Case would lie for this Misfeasance, yet the Covenant lies not, for this was performed by the De-

Breach assigned within the Intent. Delivery, and the Receipt of the Grains, But *per Cur'*, The Breach was well assigned, for the Intent of the Covenant was, That the Grains should be delivered without corrupt Mixture, which would render them unserviceable ; and by this fraudulent Mixture, the Defendant had disabled himself to perform the Intent of the Agreement, he had broke his Covenant. *Sir Thomas Jones, Rep. 191. Raym. 464. id. Case.*

Breach assigned as general as the Covenant.

Covenant to permit the Plaintiff to enjoy the Lands, and to take the Rents, Issues, and Profits of them ; and assigns the Breach, that she did not suffer him to enjoy the said Lands, but had received the Rents, Issues, and Profits thereof from the Time of making the Indenture to the Day of the Writ, &c. *Per Cur'*, Though he doth not alledge a special Disturbance by Entry or otherwise, and though he assigns the Breach generally that the Defendant received the Rents, &c. and saith not what, yet it's good ; for in Covenant the Breach may be assigned as general as the Covenant, though not in Debt on Bond for Performance. *Cr. Car. 176. Sims and Smith. Jones 218. idem Case.*

Breach assigned as general as the Covenant, yet not good.

Declaration is of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat, Drink, Apparel, and other Necessaries, and does not shew in particular what other Things were necessary ; and the Breach was assigned as general as the Covenant, and shews not what other Things are necessary, so as the Court may judge if it were necessary or not. Declaration is ill. *Cr. Jac. 486. Mills and Affell. 3 Lev. 170. contra, Procter and Burdet's Case.*

Lessor covenants with his Lessee for Six Years, That if he be minded to let the Land again after the End of the Term, that the Lessee shall have the Refusal before another during the Lease. He makes a Lease to a Stranger for 21 Years to commence presently, and after the End of the Six Years, Lessee brought Action of Covenant. It lies not; for tho' it was their Intent, yet the Words are, That if after the Term he would let. So that this shall not restrain him during the Term. 2 Roll. Rep. 332. According to the Words, and not according to the Intent. *Walter and Mountague.*

*Breach.*

*In many Cases an Endeavour shall be esteemed a Breach or Forfeiture, tho' it take not full Effect.*

Covenant not to devise to any Person but only to his Sons or Daughters, and he devieth it to a Stranger and dies, and his Executor never consents to the Devise; yet it's a Breach, for that he hath done all that was in his Power to pass it away by his Will, and has put it in the Power of the Executor to execute it. *Burton and Horton, Trin. 3 Jac. B. R.* Devise to a Stranger against his Covenant, and the Executor assents not.

If Grantee of a Reversion covenants not to grant the Reversion to *J. S.* If he grant the Reversion to *J. S.* by his Deed, altho' the Lessee never attorn, yet this is a Forfeiture; for that he hath done his Endeavour to grant it, and put it in the Power of a Stranger to perfect it. *Burton and Horton's Case.*

If Lessee for Years covenants not to assign it, by which it may come to *J. S.* and obligeth him to perform Covenants, and after he assigns this to *J. D.* This is a Breach of the Condition, for

Covenant not to assign by which it may come to *J. S.*

as

as much as by this Means it may come to J. S. Cumin and Richardson's Case.

In Covenant, Plaintiff declares upon a Lease made by the Queen to G. B. and brought the Reversion to himself by divers mean Conveyances, and brought the Term to the Defendant, by a *Que Estate* he hath by divers mean Conveyances in general, *concurrentibus iis que in jure requiruntur*, and assigns divers Breaches in not repairing of the Premisses. The Defendant pleads, *Non infregit conventiones*. Plaintiff demurs, and Judgment pro Quer'. 1. The pleading

*Qu. Estate* in a Term in another Person, under whom he claims not, but is a Stranger, is good; for he is not privy to the Estate and Conveyances in a Stranger. 2. The Plea is too general.

1st. Several Breaches being alledged. 2d. Two Negatives may not make a good Issue, and the Breach is in *non reparando*, *ideo non infregit*, &c. cannot be good. 3 *Levins* 19. Pitt and Russell, *Hill* 32, 33 *Car. 2. Rot.* 503. 3 *H.* 4. 8. *Br. cond'* 8<sup>o</sup>. there was a Covenant between the Lessor and the Lessee, That the Lessor during the Lease might be Four Days in a Year in the House without being put out under Pain of 100*l.* and the Lessor came to enter, enter, Lessee and the Lessee shut the Doors and Windows: shut the Doors It was held, that was no Breach of the Covenant without saying, That the Lessee put him out; cited *Godbold* 75.

Covenant to enter, and not to be put out; he came to enter, Lessee and the Lessee shut the Doors and Windows: and Windows, no Breach.

In Action of Covenant the Plaintiff may assign as many Breaches as he will, tho' not in Plaintiff may Debt on Obligation for Performance of Covenant; for in that Case there ought to be a Certainty, and certainly to be alledged. *Cro. Car. 176.* *Sims and Smith*.

The Plaintiff assigns three several Breaches; he shall have Judgment for them wherein the Breach is well assigned, for they are as several Actions, especially the Defendant demurring upon the whole Declaration. *Cro. Jac. 557.* *Bressy and Humpreys.*

*Et sic* — is a sufficient Averment of the Breach.

Action of Covenant by an Apprentice, and assigns for Breach, that the Testator of the Defendant had covenanted to instruct the Plaintiff, &c. and to find him with Meat and Drink during the Term; and yet the Defendant, after the Testator's Death, had put the Plaintiff out of his House and Service; *& sic*, kept him from Meat and Drink: *Per Cur'*, *Et sic* is a sufficient Averment of the Breach, and it's but Matter of Form, (it was demurred to) *1 Sid. p. 216.*

*Wadsworth and Guy,* *1 Keb. 761. Id. Ca.*

In a Charterparty the Defendant covenants to pay to the Plaintiff 3*l.* per Tun for Goods imported, and the Breach is assigned in not paying for so many Tuns and one Hogshead, which comes to so much: And upon Demurrer, the Declaration and Breach is ill in assigning Non-payment for the Hogshead, for the Covenant is only to pay so much per Tun. *Alister*, had it been to pay *secundum Ratam* of so much per Tun. *2 Lelinz. 124. Rea and Barnet's Case.*

#### *Breach assigned. Vid. Declaration.*

Testator demiseth Lands, and covenants that the Tenant shall quietly enjoy without the Interruption of the Lessor, or any Persons claiming under him. Breach is assigned, the Defendant pleads *plene administravit*. The Covenant is,

Three Breaches assigned, the Plaintiff shall have Judgment for them that are well assigned.

*Et sic* — a sufficient Averment of a Breach.

is, That he shall quietly enjoy without the Interruption of the Lessor, *Vel aliquarum Personarum clamantium per praed' Lessor bered' vel assign' suis vel per eorum medium consensum vel procurationem;* and assigns for Breach, that one Michael Clavell *clamans titulum a praed' Lessore postea scilt' tali d' & tuni,* did enter and eject him. This Breach is not well assigned: The Covenant is against all Persons claiming by the Assent, Means or Procurement of the Lessor, but the Breach assigned was *clamans titulum* from the Lessor; now he may claim Title, when as in Truth he had no Title from him, and Judgment was given against the Plaintiff: Contingent Covenants shall be good, tho' the Executor paid Legacies before the Breach, for he ought to take Security to refund.

Executor pays Legacies before the Breach.

Bond with Condition to perform Articles, which recited where certain Persons were bound to the Earl of Holland, in 8 Bonds, which the Earl had assigned to the Defendant to his own Use: Now it is agreed, That the Defendant should assign these Bonds to the Plaintiff to the Plaintiff's own Use; and the Defendant covenants that the Money should be paid at the several Days limited by the Bonds, or within 8 Days after; and the Breach was assigned, that the Sum of 50*l.* payable by one of the said Bonds, was not paid the Plaintiff on the First Day of March, which was the Day limited by the Bond, and Issue thereon, and found pro Quer. The Replication is insufficient, for it might be paid within the 8 Days after, and also the Condition was for Maintenance, and so the Bond is void. *Allen 60. Hodson and Sir Arthur Ingram.*

Covenant to pay at such a Day, or within 8 Days after, Breach assigned, that the Sum was not paid at the Day.

## The Law of Covenants.

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In Action of Covenant, not to receive any Sums above 100*l.* but that all such Sums should be paid to *Hinton*; and also any Sum received under 100*l.* he was in convenient Time to pay it to *Hinton*: The Breach was assigned in receiving of several Persons 2000*l.* and not paying it over to *Hinton*, it is no sufficient Breach without saying, That he received the Sum of 2000*l.* by Sums under 100*l.* or laying the Breach solely upon receiving the 2000*l.* by Sums above 100*l.* by *Keeling and Twisden*, 2 *Keb.* 338, 339. *Eccleston and Clypsum*, 1 *Sand.* 153. *Mesme Case*.

The Case, *Knight and Keech*. There were mutual Promises and Agreements between the Plaintiff and Defendant, which were specially set forth in the Declaration: In which the Plaintiff alledged generally, That the Defendant non *performavit agreementum suum prædictum*, without shewing a particular Breach. After Verdict *pro Quer'*, Error assigned was, That the Breach was too general; which being Matter of Substance, the Right of the Action could not be tried, and therefore it is not within any of the Statutes of Jeofails: But Judgment was affirmed, because they are mutual; and where Promises are executory on both Sides, Performance need not be averred, because it is the Counter-promise, and not the Performance raiseth the Consideration. *Vid. 4 Mod.* 188.

Error of a Judgment in Action of Covenant, to enjoy a Lease for Remainder of a Term to come: In Consideration whereof, the Defendant covenants to pay an annual Rent at several Feasts during the Lease. The Breaches assigned in Non-payment of the annual Rent, *ad separalia Festa*, during the Residue of the Term. *Per Cur'*, it's well enough, as if a Breach had been at every Day. *Contra in Debt on a Bond to per-*

D d form.

## The Law of Covenants.

form. The Certainty of the Days past is not necessary, especially in the negative Covenant; in which it is sufficient to produce the general Words, and the rest may be given in Evidence: And this Breach goes to all the Time past, and may be pleaded so in Bar of any future Action. The Damage may be given in Evidence for how many Days are, and here it will be intended the Defendant paid it at no Day. *1 Keb. 490. Smith and Conyers, and 468.*

*Query of the Condition to perform Covenants,* whereof one was; The Defendant covenanted he was seised of an indefeasible Estate in Fee-simple; and the Defendant pleads, Covenants performed. Plaintiff replies, That he was not seised of an indefeasible Estate in Fee-simple. Defendant demurs generally, because he supposed that the Plaintiff ought to have shewed of what Estate. The Defendant was seised, in regard he had departed with all his Writings concerning the Land in Presumption of Law, and therefore the Plaintiff well knew the Title. *Per Cur'*, The Breach is well assigned according to the Words of the Covenant. *Kay. 14. Glinister and Audley, and his Case before.*

Defendant covenants, That he, his Executors and Assigns, would repair a Mill let to him: And the Plaintiff alledgedeth, that the Mill was defective in Reparations, and the Defendant, his Executors and Assigns, did not repair it. Demurrer to the Declaration, because he did not alledge that he, nor his Executors, nor Assigns; for if any of them did repair it, the Action lies not. It ought to have been in the Disjunctive, not in the Conjunctive: And of that Opinion was the whole Court; and he shall take Advantage of this Fault, tho' it was not assigned by the Demurrer. *Cro. Eliz. 348. Colt and Howe.*

Defen.

Breach assigned according to the Words.

Where the Breach ought to be laid in the Disjunctive, and not in the Conjunctive.

Defendant covenants with the Plaintiff to build an House, secundum regulas prescriptas per Statute pro re-edificatione London; and assigns a Breach, that the Defendant did not cover the Cantilevers with Lead, secundum regulas prescriptas per Stat. præd'. Judgment per Default, and Writ of Enquiry, and 15*l.* Damages. It was moved in Arrest of Judgment, That the Breach was not sufficiently assigned, not alledging in Fact, that the Cantilevers ought to be covered with Lead. But by *Hales*, it being said that he did not cover them with Lead secundum regulas, &c. this is an Averment that the Statute so prescribes. 2 Le-Averment vñz 85. *Dive and Fenmāh*, 3 Keb. 142. *Id. Ca.* sufficient.

*Rawlins and Vincent.* 1 W. & M. B.R.

If a Man replies according to the Covenant, it's sufficient; therefore a Man may assign his Breach in the Disjunctive, if the Covenant be so, *Stiles* 473. as if the Covenant be, you will make Satisfaction to the Plaintiff or to his Council, the Assignment of the Breach must be in the Negative, that he did not make Satisfaction to the Plaintiff, nor to his Council.

Breach of Covenant assigned in Time after the Action brought, is ill. In Debt on Bond, Defendant demands Oyer of the Obligation, and it was for Performance of Covenants in an Indenture, and pleads Conditions performed. Plaintiff replies, and assigns a Breach in Non-payment of the Rent, 20 Julii 17 Car. where the Bill was filed, *Trin.* 17 Car. which Term ended 14 Junii, and so the Breach assigned after the End of the Term in which the Bill was filed. *Sid.* 307. *Champion and Skipwith*, 2 Keb. 106. *Id. Ca.*

Action of Covenant on Articles, wherein Breach was assigned, That the Defendant did not pay 20*l.* during the Time of a Lease made by the Plaintiff to the Defendant, at the several Days therein mentioned. Error upon this. *Per Allen*, it is ill, and the Breach must be assigned particularly, so that the other Party may plead to it. *Per Windham*, it is well enough, as if really a Breach had been at every Day. *Contra in Debt* on a Bond to perform, which *Twisden* agreed. Judgment affirmed. 1 Keb. 372. *Smith and Comyns*.

## Breach.

In Debt, the Plaintiff declared of a Deed, comprehending divers Covenants; for the Performance of which, the Defendant obliged himself in the Penalty of 40*l.* and sets forth, The Defendant had broken the Covenants. Defendant pleads *non est Factum*; and found for the Plaintiff. It was moved in Arrest of Judgment, That tho' the Issue was found *pro Quo*, yet he having assigned no Breach, no Cause of Action appeared upon the Record, and so he could not have Judgment. Indeed, had the Action been brought upon the Bond of Performance, and *non est Factum* had been pleaded, no Breach needed to have been assigned, for then the Declaration is only upon the Bond, without mentioning any Thing in the Condition, *vid. Roff. Entr. 162.* yet the Court gave Judgment for the Plaintiff, for the Verdict hath aided these Defects.

Where and in what Case Breach need not be assigned.

Plea, that the Defendant broke all the Covenants.

Tho' the Pleading lie broke, all the Covenants would not have been good upon a Demurrer, and that for two Reasons: 1. Because it would have been double, in regard the Breach of any one of them would have intituled the Plaintiff

aff to the Penalty. 2. For that some of the Covenants were such as he ought to have assigned on a Special Breach, and upon that might have been the Judgment of the Court: But the Verdict hath aided these Defects. *1 Vener. 114, 126, Barnard and Mallet.*

*Per Hale, C. J.*: In this Case he conceived the Declaration ill on Demurrer; because for a Penalty a Man can assign but one Breach, and the Condition Precedent must be averred; but being generally alledged, that he had not performed any Covenants, it's only multifarious, which is aided by taking Issue on *non est Factum*; which the Court agreed, and that the Merit of the Cause is tried, and so it's aided by the late Stat. *Stat. 17 Car. 2. c. 8. Judgment pro Quer'*, *2 Keb. 766. a. 8.*

For a Penalty  
a Man can  
assign but one  
Breach.

Breach by Construction.

A Covenant not to assign a Thing in Action to any Person or Persons whatsoever. An Assignment in Equity, is a Breach of the Covenant; for in Law no Assignment can be of a Thing in Action, therefore the Intent of the Covenant must be of such an Assignment as can be, and that is in Equity. *Raym. 459, 460, 461.*

Plaintiff declares, That the Defendant had covenanted to pay him so much Money as he should expend for Repairing and Victualling a Ship for him; and avers, That he had spent 300*l.* in Repairing and Victualling of it, and that he gave the Defendant Notice of it such a Day; and for Non-payment, brings the Action. Where a Special Breach of Covenant need not be averred. *Stiles, p. 31. sic non tenet conventionem in hoc.*

In some Cases one need not be very particular in assigning of a Breach. A Breach was assigned for not Repairing the Mill and the Mill-Banks, and for not leaving the Mill-stones, and did not shew in what Vill the Mill-Banks were; and need not, for it shall be intended to be in the same Vill where the Mill is; and shews not whether it was a Corn-Mill, or a Fulling Mill; but that is all one, the Breach being assigned for not Repairing.

*Note.* There were Three Breaches assigned, and the Defendant having demurred to the whole Declaration, the Plaintiff shall have Judgment without Question for them wherein the Breach was assigned, for they are as several Actions; and indeed they were all well assigned.

*Cro. Jac. 557. Bressy and Humpreys. Devant.*

#### City of Exeter versus Clare.

A Covenant in the same Indenture pleaded in Bar of the rest.

Reciprocal.

Præmissa &  
Prædimissa.

In Debt for Rent. Defendant pleads a Covenant in the same Indenture in Bar of the whole Rent, That in case of Land charges the City covenanted to abate 40*l. per Annum* so long as they continued. Plaintiff demurs. *Per Cur'*, This is only a Plea as to so much, not to the whole Rent. Also Wild held this a reciprocal Covenant also: *Sed per Cur'*, being in the same Indenture, it's pleadable as an Agreement in Bar of so much; and Judgment *pro Quer'*. *3 Keb. 331.*

The Breach was assigned in such a House, Parcel *Præmissorum* to him assigned, and saith not *Præmissorum Prædimissorum* (there being divers Things excepted in the Lease, and this might be Parcel of the Things excepted): But *per Cur'*, *Præmissa* shall be intended *Prædimissa*, and

and shall not extend to any Lands not *dimissa*.

*Cro. Car. 221. Congham and King.*

Covenant is, That *A.* and *B.* and *C.* shall pay, and the Breach assigned was, That the Defendant did not pay : He need not say, Nor any of the others : And the Court allowed this Difference. If the Action had been brought against all, then the Non-payment in all shall be alledged ; otherwise, if against one only, it sufficeth that he hath not paid. *Latch. 50. Constable's Case.*

Tho' the Breach be not alledged so full and formal, yet it may be good : As *Licet* the Testator entered, instead of, *Quod idem tamen le Testator*, &c. *Cro. Jac. 383. Lady Platt's Case.*

It sufficeth to assign the Breach as general as the Covenant is.

*It sufficeth to assign the Breach as general as the Covenant is.*

Lessee covenants to repair the House well from Time to Time, during the Term ; and at the End of the Term, to leave the same well repaired to the Lessor : And assigns for Breach, That he did not leave it well repaired at the End of the Term. The Breach is good, tho' he doth not shew in what Point it was not well repaired : But if the Defendant had pleaded, That at the End of the Term he had delivered it up well repaired, then if the Plaintiff will assign any Breach, he ought to shew in what Point particularly it was not repaired, so as the Defendant might give a particular Answer to it. *Cro. Jac. 170. Hancock and Feild. Noy 123.*

So the Defendant let the Manor of *S.* by Indenture for 10 Years, and covenanted that he had lawful Right and Estate to let it for that Term ; and assigns for Breach, That he had not Right nor lawful Estate to let it, and so broke his Covenant. It's well assigned, tho' it is not shewed that they had an Estate, nor how the

Lessor had any Right; or that a Stranger had ejected him by Title: For the Covenant being general, the Breach may be assigned as general as the Covenant; and it lies not in the Plaintiff's Notice, who had the rightful Estate: But the Defendant ought to have maintained, That he was seised in Fee, and had a good Estate to demise; and then the Plaintiff ought to have shewed a special Title in some other. Cro. Jac. 304. *Salmon and Bradshaw*, and 9 Rep. 60. b.

Lessor covenants, That he was then lawfully seised in Fee of an Indefeasible Estate. Plaintiff in his Declaration *in facto dicit*, that at the Time of the making of the Indenture he was not lawfully seised in Fee, and so he had not performed the said Covenant. Defendant pleads *non est Factum*; the Breach is well assigned, tho' he shews not that any other was seised, because the Covenant is general; so the Breach may be assigned as general, especially as this Case is, where the Defendant has made the Declaration good by his pleading *non est Factum*. So he allows the Breach, if it had been his Deed. Cro. Jac. 3090 M — and *Ballet*.

Declaration  
made good by  
pleading *No  
n est Factum*.

But in Cro. Jac. 486, *Mills and Astell's Case*, the Declaration is of a Covenant, whereby the Defendant covenanted to find the Plaintiff with Meat and Drink, and other Necessaries, and doth not shew in particular what other Things were necessary, and the Breach was assigned as general as the Covenant, and it was adjudged ill, because he shewed not what were Necessaries. *Dru.*

A good Breach may be assigned, tho' not directly within  
the Words.

By Covenant in a Charterparty, the Parties mutually covenant, That the Master of the Ship (who is the Plaintiff) shall pay two Parts of the Port-Charges, and the Factor of the Defendant the third for all the Voyage. In Action of Covenant the Plaintiff shews, That he sailed his Ship from London to Cadiz, and there he paid all the Port-Charges, and the two Parts for himself, and the other Part for the Defendant, and that the Defendant had not repaid him his Part. After Judgment by *Nihil dicit*, and Writ of Enquiry of Damages returned, these Exceptions were taken.

i. That here is not any sufficient Breach, for the Defendant was not bound by the Covenant to pay to the Plaintiff the third Part, but to the Collector of the Port-Charges; and there he ought to have shewed that the Defendant had not paid his third Part: *Sed non allegatur*. For when it is averred, That the Plaintiff had paid the third Part, it shall be intended that the Defendant had not paid it, and the Plaintiff was necessitated in his Default to pay the whole, otherwise the Ship should be stayed in the Port.

ii. It is not alledged that the Port-Charges paid by the Plaintiff, were paid in this Voyage. *Per Cur'*, It shall be intended to be the same Voyage. Sir Thos Jones, p. 186. Bellamy and Russell; and so it may be a good Breach, tho' not directly within the Words, as is the Case of Goodband and Griffith, Sir Thos Jones 191. The Declaration was, That the Defendant (who was

## The Law of Covenants.

was a Brewer) covenants with the Plaintiff, that he shall have all the Grains that should proceed out of the Copper that he should brew for Ale or Beer, seven Parts in eight, paying a certain Rate for them, (that is to say) so much for the Grains and Beer, and so much for Ale ; and amongst other Breaches, shews that the Defendant, *subdole & callide*, to defraud the Plaintiff of the Benefit of the said Contract, mixed Hops in the [Brase, or Malt] that he brewed ; so that the Grains became bitter, and unserviceable Fodder for his Cows, and so a Breach. The Defendant pleaded *Non infregit*, and had a Verdict. It was moved, that the Breach was not well assigned, for that the Grains were delivered ; and tho' the Defendant had done ill in mixing the Hops, yet no Action of Covenant lies, for this was performed by the Delivery, and received Part of the Grains, and Action of the Case would lie. *Per Cur'*, The Breach is well assigned, for the Intent of the Covenant was, that the Grains should be delivered without any corrupt Mixture which should render them unserviceable, and so he had broke his Covenant. Sir Tho. Jones 191.

*Per Stat. 8 & 9 W. 3. c. 11.* In all Actions after 25 March 1697. prosecuted in any of the King's Courts of Record, upon any Bond or Penal Sum for Non-performance of Covenants,

The Plaintiff the Plaintiff may assign as many Breaches as he may assign as shall think fit ; and the Jury at the Trial shall and may assess Damages for such of the said Breaches so assigned, as the Plaintiff at the Trial shall prove broken, and the like Judgment shall be entered on such Verdict, as hath been usually done in such Action ; and if Judgment shall be given for the Plaintiff upon Demurrer,

murrer, Confession, or *Nihil dicit*, the Plaintiff Judgment pro upon the Roll may suggest as many Breaches Plaintiff on Demurrer, as he shall think fit; upon which shall issue Confession, a Writ to summon a Jury to appear at the or *Nihil dicit*; Assizes in that respective County, to enquire the Plaintiff of the Truth of every one of the laid Breaches, on the Roll and to assess Damages accordingly; and the Justices of Assize shall make Return thereof to a Writ of Enquiry of Damages. the Court from whence the same issued. In case the Defendant after such Judgment entered, and before Execution executed, shall pay into Court such Damages so assessed, and Costs of Suit, a Stay of Execution shall be entered upon Record.

Or if by reason of Execution executed, the Plaintiff, or his Executors, or Administrators, shall be fully paid all such Damages, together with his Costs, and reasonable Charges, the Body, Lands, and Goods of the Defendant, shall be forthwith discharged, and the Satisfaction entered upon Record.

Yet shall such Judgment stand, and be as a The Judg-  
farther Security to answer to the Plaintiff, his ment shall  
Executors, &c. such Damages as shall or may stand as a fur-  
be sustained for farther Breach of any Cove- ther Security  
nant in the same Deed or Covenant contained; to answer  
upon which the Plaintiff, &c. may have a *Scire fac'* Damages for  
upon the said Judgment against the Defen- a further  
dant, his Heirs, Tertenants, Executors or Breach; and  
Administrators, suggesting other Breaches, and *scire fac'*.  
to summon them to shew Cause why Execution  
shall not be awarded upon the said Judgment;  
upon which there shall be the like Proceedings,  
as aforesaid, and upon Payment of Damages  
and Costs, Proceedings to be again stayed, and  
so roties quories, and the Defendant discharged  
out of Execution.

Action of Covenant on Articles, wherein Breach was assigned, That the Defendant did not pay 20*l.* during the Time of a Lease made by the Plaintiff to the Defendant, at the several Days therein mentioned. Which by *Aless* is ill, and the Breach must be assigned particularly, so that the other Party may plead to it. *Windham* said, it's well enough, as if really a Breach had been at every Day. *Contra in Debt on a Bond to perform*, which *Twissda* agreed. This was in Error of a Judgment in *Durham*: Judgment affirmed. *Keb. 371.*  
*2 Lev. 78.* and *1 Keb. 468.* *Vide Smith and Coniers.*

## CHAP.

## C H A P. XLII.

Pleading: Vide *Sparsum*, under each Title.

**O**N Oyer of the Condition it was for Performance of Articles, and then he pleads the Articles, and that he had performed them. The Plaintiff prays, that the Articles *irrotulentur in hac verba*; which being done, the Plaintiff demurs generally, and now shew'd for Cause, That the Defendant in pleading the Articles had omitted Part of them. *Ex Opinio Cur'* was against the Defendant; for perhaps the Plaintiff would have assigned a Breach upon the Things omitted, of which he is deprived by this Means. 3 *Lev.* 50. *Hudson and Spur.* H. 33. Car. 2, C. B. Rot. 421.

Covenant upon Indenture of Lease, and affirms a Breach in Nonpayment of the Rent, Debt for Rent according to the Covenant in the Indenture, upon Indenture, the Plaintiff demurs generally, & *per tot' Cur' nil debet* is no Plea in good. Defendant pleads *nil debet*. Plaintiff *nil debet* not good. *Tindall and Hutchinson.* 3 *Lev.* 170.

In Covenant upon Warranty of Lands for Where it Years, the Plaintiff ought to shew what Estate or Right he which enter'd into the Lands had at the Time of his Entry; and it is not sufficient to aver, that he had good Title. 2 *Sand.* 178, 179, 180, 181. *Worten and Hele.* *Idem Casus,* 1 *Keb.* 294. 1 *Mod.* 66. 1 *Lev.* 301.

must be shewed what E. State or Right he who entered into the Land had at the Time of his Entry.

In Demurrer upon the whole Declaration the Plaintiff shall have Judgment for the Breaches well assigned.

If Action of Covenant be brought, and divers Breaches be assigned, and some are good and others ill; if the Defendant demur upon the entire Declaration, the Plaintiff shall have Judgment for those Breaches which are well assigned, and shall be barred for the Residue. 2 Sand. 380. on *Pinkney's Case*.

Covenant in the same Deed pleadable in Debt for Rent; and why.

Debt for Rent upon a Lease for Years: Defendant pleads in Bar a Covenant *per* the Lessor, that the Lessee shall deduct so much for Charges. *Per Cur'*, The Covenant being in the same Deed is well pleadable in Bar, the Thing being executory, and the Party shall not be put to a Circuit of Action, and to bring Action upon his Covenant. 1 Lev. 152. *Johnson and Car.*

Lease by E. Stoppel.

If a Man let Land to me by Indenture, which is the Land of J. S. who is then also seised of the Land, and after I enter upon J. S. who after re-enters, whereupon I bring my Writ of Covenant, the Lessor cannot say that I was not in the Land by his Demise, although I was a disseisor to J. S. by my Entry; for the Lessor is estopped to say this, in as much as this was a Lease by Estoppel against him. 1 Roll. Abr. 874. *Stiles and Herring.*

The Plaintiff declares upon an Indenture dated the 7th of Sept. 1657. whereby the Defendant covenants, That he and one T. W. would deliver to the Plaintiff so many Maunds of Salt-petre at such a Rate before the 20th of October next ensuing, the Plaintiff paying so much a Maund; and to the Performance thereof, the Defendant binds himself in 500 l. Defendant demands Oyer of the Deed; and it appears that between the said Covenant and the Obligation there is a *Proviso*, That if the Defendant should between that and the 20th of October

October he disabled by the Sea, &c. to deliver the Salt-petre, then the Deed should be void. Defendant pleads, That he had prepared the Salt-petre, and that the Boat wherein it was put was cast away. Plaintiff replies, That the Defendant had sufficient Salt-petre over and above what was cast away. Issue thereupon, and found pro Quer'. Per Cur', The Action is brought upon the Covenant, and not upon the Penalty, and the reciting of the Penalty is but Surplusage. 2. The Declaration is sufficient without Recital of the Proviso, according to Ugbtred's Case, and the Defendant ought to plead the Proviso. Raym. 65. Elicot and Blake. Devant.

Debt on Bond conditioned to perform Covenants, one of which was for Payment of so much Money upon making such Assurances. The Defendant pleads he paid the Money at such a Day, but does not mention when the Assurance was made, that it might appear to the Court that the Money was immediately paid pursuant to the Condition; and for that Reason the Court were all of Opinion, That that Plea was not good, and Judgment for the Plaintiff upon Demurrer. 2 Mod. 33. Duck and Vincent.

Defendant Lane married Dudly Gory Daughter of the Plaintiff, and had 3000*l.* in Marriage, and covenants within a Year to make an Assurance of Lands, within the Realm of England, of the Value of 400*l.* per Ann. to Sir Arthur Gory for a Jointure, in such Manner as Sir H. Yelverton and Serjeant Crew shall devise. Defendant pleads in Performance of this Covenant, That at such a Time he was seised of 400*l.* per Ann. and he informed Sir Arthur Gory of it, and that Sir Arthur did not require him

In Covenant with a Proviso, the Declaration good without Recital of the Proviso.

Covenant to pay Money on making Assurances, Defendant pleads Payment, but saith not when the Assurances were made.

## The Law of Covenants.

him to make the said Jointure. This Plea is ill, for Four Causes:

### Notice.

1. He ought to have given Notice to Sir *H. Newerton* and Serjeant *Crew*, because they are named: *Aliter*, had it been as the Council of the said Sir *Arthur* should appoint, then it should have been given to the Party.

### Place of Notice issuable.

2. He shews not the Place of Notice, and that is issuable.

3. He shews not where the Lands lie, whether in *England*, or not.

Plead that he  
was seised of  
a Freehold,  
and shews not  
of what E-  
state.

4. He saith he was seised of a Freehold, but shews not of what Estate, and perhaps it was only for Life. 2 *Roll. Rep.* 333. Sir *Arthur Gory* and Sir *Robert Lane*.

### Traverse material.

In Action of Covenant, the Plaintiff declared upon the Indenture of Covenant; and the Covenant was, That a Ship shall go with the next fair Wind, and that the Merchant shall pay so much for Freight. Defendant saith, by Way of Traverse, That he did not go with the next fair Wind. And per *Cur'*, The Traverse is not good, for that which is material shall be traversed, and that is, that the Ship did not go at all. *Popb.* 161. *Constable and Clobery*. *Latch* 12. *Idem Casus*.

### Warrantia Charta depending, no Plea.

*Warantia Charta* depending, is no Plea in Covenant, for they are of different Nature; one is real, and shall bind the Land which the Lessor had at the Time of the Judgment; the other is personal, and for which he only shall have Dammages. *Nelv.* 139. *Hob.* 3. 1 *Rolls Rep.* 25. *mesme Case*.

In Debt on Bond for Performance of Covenants, if the Defendant plead generally the Performance of the Covenants, and the Plaintiff doth demur generally upon it without shewing Cause of Demurrer, Judgment shall be given according to the Truth of the Case; for that Default of Pleading is but Matter of Form, and is aided by *Stat. 27 Eliz.* But if any of the Covenants be in the Disjunctive, so as it is in the Election of the Covenantor to do the one or the other, then it ought to be specially pleaded, and the Performance of it, for otherwise the Court cannot know what Part hath been performed. *1 Leon. 311. Ogletorp and Hide.*

Request is traversable in Covenant, where the Covenant is to be performed upon Request.

*2 Leon. 5.*

Covenant was, That whereas *E. T.* had bargained to the Plaintiff a Close; and whereas the said *E. T.* hath already morgaged to *J. S.* divers Lands in *G.* whereby the said Close is morgaged, or supposed to be morgaged, to redeem and set free the said Close by a Day. Defendant pleads, the Close was not morgaged, *Et sic dicit quod clausum præd' fuit redempt' liberat' & exonerat'.* Plaintiff replies, That the Close was morgaged to *J. S.* and found for the Plaintiff upon this Issue. *Per Cur'*, It is a good Replication, tho' he saith not *Quod pignorat' fuit* to the said *J. S.* and is not redeemed, for it might be redeemed before the Day. The Defendant hath offered a particular Point in Issue, that it was not morgaged; and the Plaintiff answers it when he saith it was morgaged, and need not alledge that it was not redeemed; for there shall never be intended any Redemption, because the Defendant pleads it was not morgaged. A special

E e Plea

The Plaintiff Plea in Bar is always answered with a special Replication in the Point alledged. The Difference is, such Pleading shall be good after Verdict, but not if demurred to. *Vel. 24. Bayly and Taylor. Cro. El. 899. mesme Case.*

Averment of Performance, where it must or need not. *Vid. 1 Lut. 249. & hic sub Tit. Re-lease.*

#### Concord pleaded.

Covenant upon Indenture, by which the Defendant covenants to permit the Plaintiff to receive 100*l. per Ann.* Rent, whereof 60*l. per Ann.* for Payment of a Debt, the Residue to be paid by the Defendant, and assigns a Breach in Disturbance by the Defendant to receive the Rent. Defendant pleads a Concord between the Plaintiff and Defendant, that each of them should deliver his Part of the Indenture to the other to be cancelled into the Hands of a Third Person, and that each should be exonerated of all Actions upon the Indenture; and avers, the Defendant delivered his Part to the Third Person. Plaintiff demurs, and Judgment for him; for Concord is no Plea, if it be not executed on both Parts. *3 Lev. 189. Russell's Case.*

Concord not  
pleadable, if  
it be not exe-  
cuted on both  
Parts.

Lessee covenanted for him and his Assigns to repair and maintain the Houses in Reparation from Time to Time during the Term, and shews that the Lessee assigned all his Term to the Defendant, and for Default of Reparations after the Assignment he brought the Action. Defendant pleads, That after the Decay he made such a Concord that the Plaintiff should have 30*s.* and such Goods, in Satisfaction of that Destruction, &c. and shews it to be executed. It was demurred; for the Action being grounded upon a Deed, cannot be discharged by a Deed. But *per Cur'*, The Plea is

Action  
grounded on  
a Deed can-  
not be dis-  
charged by a  
Contract.

is good; for it is not pleaded in Discharge of the Covenant, but only for the Damages which are demanded by reason of the Breach of the Covenant, and the Covenant remains: And this Plea sounds only in discharge of the Where a Particular Defendant, and is not like to the Case of an <sup>sol</sup> Concord <sup>is good.</sup> Obligation with a Condition, which cannot be discharged by a Contract, for there it is a Duty certain. And in every Action where only Amends is demanded by Way of Damages, Accord executed is a good Bar in Discharge of them. *Cro. Jac. 49. Alden and Blayne.*

Action of Covenant to perform Articles, and pay Money; Defendant pleads Payment of the Money (*5 l.*) after the Day, which the Plaintiff accepted in Satisfaction of *50 l.* which Plea not good not being pleaded by Way of Accord and by Way Satisfaction of the Covenant is ill, wherein Damages also are recoverable. Issue was for the Defendant, who pleaded it. But *per Cur'*, There being a full Issue on an Affirmative and a Negative it is well enough, as if it had been pleaded in Satisfaction of Breach of Covenants. And here it's Tantamount, being in Satisfaction of the Thing covenanted to be done, and no Repleader was awarded, but Judgment proDefendant, *1 Keb. 210, 246. Matthews and Raymond.*

A Man made a Lease of Land for Years by Deed, and covenanted, That the Lessee and his Assigns shall enjoy it during the Term. Lessor makes the Defendant his Executor, and dies. The Lessee assigns over his Term. A Stranger enters upon the Assignee; the Assignee takes *40 l.* in Satisfaction of his being *40 l.* accepted ejected of the Assignor, and afterwards brings in Satisfaction Action of Covenant against the Executor of his being ejected, &c. the Lessor, the Defendant.

## The Law of Covenants.

In 2 Actions,  
one against  
the Assignor,  
and the other  
against the  
Executor of  
the Lessor.

To be a Deed  
of Discharge.

pleads the Acceptance of the 40*l.* of the Assignor in Satisfaction of the Wrong done to him, in Bar of the Action. Plaintiff demurs. *Rolls:* Here are Two Covenants, one of the Lessor, and one of the Assignor, and therefore the Party may have Two Actions; and therefore he is not here barred to bring this second Action, though he hath barred himself by the Acceptance of the 40*l.* from bringing Action against the Assignor, and the Defendant hath not pleaded that the 40*l.* was given, in Satisfaction of the Covenant, for then it had been otherwise. *Stiles 300. Whitway and Pinsent.*

Without a Deed, because this enures as a Release of the Covenant, which may not be without a Deed. But in Satisfaction and Performance of a Thing to be done, Accord with Satisfaction is a good Plea without a Deed. And in *Blake's Case*, Payment of Money is no Plea in discharge of a Bond, but in discharge of Money to be paid by Bond. So pleaded in *Peto's Case*, 9 Rep. and because Accord with Satisfaction was pleaded in Satisfaction of the Entry and not of the Covenant, it was held a good Plea. *Dodderidge* admitted, That it shall not be a good Plea for the Two Entries made after the Accord, because as to them the Covenant was not broken at the Time of the Accord; but it is clearly good for the first Entry before the Accord, and the Plaintiff cannot have Judgment for the other Two Entries upon this Action: And Judgment *pro Deft.*

In Covenant, Plaintiff assigned a Breach in not paying 8*l. per Ann.* and, 2. In not purchasing Lands worth 100*l.* Defendant pleads Accord, and that he had paid Part, and saith not how much. *Per Cur'*, Accord is a good Plea to a Covenant to pay a Sum certain,

or

or an Obligation when joined with other Things uncertain; but this Accord not mentioning what Part he had paid in certain, is void.

*2 Keb. 51. Outram and Relfton.*

Covenant brought by the Heir in Reversion against the Executor of Tenant for Life, for Breach of a Covenant in the Testator in not repairing an House. Defendant pleads, the Testator died 19 March, and that the 22d of Concord March, *concordat' & agreeat' fuit inter le Plaintiff pleaded,* and Defendant, that the Defendant should quietly depart, and leave Possession to the Plaintiff; and in *considerat' inde* the Plaintiff agreed to discharge him of the Breach in *non reparando:* And shews, that on the 25th of March he did quietly depart, and shews an Excution of the Concord as he supposed. Plaintiff demurs. Plea is not good, because the Time is uncertain upon this Agreement when he shall depart; and although the Defendant shews he did depart within Five Days after, yet this shall not aid the first Uncertainty; for the Concord is the Foundation of the whole, which ought to be certain when it shall be performed. *Yel. 124. Sanford and Cutcleft.*

Accord with Satisfaction by Deed shall be a good Plea in discharge of a Covenant, as well before Breach as after, because it is an Action merely personal, wherein Damages shall only be recovered. *Palmer 110. Roberts and Stoker.*

Lessor covenants, That his Lessee shall enjoy his Lease peaceably during his Term, and that the Lessor shall not make any Entry upon him during that Time. The Lessor enters Three Years after, and the Lessee brought Action of Covenant, and alledgedeth Three

Accord with Satisfaction after Covenant broken, is a good Bar; so if it be before, if the Covenant before Payment of Money; but in other Cases there ought.

Breaches. Defendant pleads Accord with Satisfaction in Performance, and Satisfaction of this Covenant after the first Entry, and before the Two other Entries. *Per Haugron*, Accord with Satisfaction is no Plea in discharge of a Covenant.

In Covenant, the Breaches assigned were, That the Houses were not in repair, that the Locks were taken away, and that the Hedges were broken down, and the Ditches unsavour'd. The Defendant pleads an Agreement made between the Plaintiff and him, That he should employ a Workman Three or Four Days in and about the Repairing the House, which should be a sufficient Satisfaction, and that he employed a Workman, &c. Upon this Plea they were at Issue, and a Verdict for the Defendant. Exceptions were taken in Arrest of Judgment; 1. Where Accord and Satisfaction is pleaded, it must be real; but in this Case, it was no more than the Defendant was obliged to do. 2. There are several Breaches assigned, and the Defendant has only answered the Repairs of the House; and so it is a Discontinuance in Pleading, which is not aided by a Verdict. 3. The Satisfaction is uncertain, viz. to employ a Man to work for Three or Four Days; and for these Reasons, Judgment was stay'd.

*Curia.* In Covenant where Damages be uncertain, and to be recovered, as in this Case, a lesser Thing may be done in Satisfaction, and there Accord and Satisfaction is a good Plea; but in Action of Debt upon a Bond, where the Sum to be paid is certain, there a lesser Sum cannot be paid in Satisfaction of a greater. 4. *Mod. 88. Adams and Tapling.*

Action of Covenant to perform Articles and Payment of Money: The Defendant pleaded Payment of the Money after the Day, which the Plaintiff accepted, which being not pleaded by Way of Accord and Satisfaction of the Covenant, wherein Damages are also recoverable, is ill. *Hil. 13 Car. 2. B. R. Raymond and Matthews.*

Bar by Accord in Satisfaction, the Concord was pleaded to be in Satisfaction of the Covenants before any Breach of Covenants: This is no good Bar; for the Covenants being created by Deed, may not be discharged but by Deed; but Accord with Satisfaction is a good Plea in Satisfaction and Discharge of Damages in Covenants broken, and Judgment given accordingly against the Opinion in *Rabber and Stoker's Case*, 2 *Rolls Rep.* 187. *Vid. 2 Cr. 99. Alden and Blagues. 1 Pal. 110. Robards and Stoker's Case.*

Debt on Bond for Performance of Covenants in Articles of Agreement; in which it was recited, That whereas the now Defendant had found out a Mystery in colouring Stuffs, and had entered into a Partnership with the Plaintiff for the Term of Seven Years, he did thereupon covenant with him, that he would not procure any Person to obtain Letters Patents within that Term, to exercise that Mystery alone. Defendant pleaded, he did not procure any Person to obtain Letters Patents, &c. The Plaintiff replies, and assigned for Breach, That the Defendant did within that Term procure Letters Patents for another Person to use that Mystery alone for a certain Time, *Et hoc petit quod inquiratur*, &c. Defendant demurs; i. The Plaintiff sets not forth what Term is contained in the Letters Patents: But *per Cur'*,

He being a Stranger to them, need not. 2. He hath pleaded both Record and Fact together, for the Procuring is the Fact, and the Letters Patents are the Record, and then he ought not to have concluded to the County. But *per Cur'*, The Procuring is the Matter upon which the Breach ariseth, and not the Letters Patents; so that it was improper to conclude, *Prout patet per Record'*. 3 Mod. 79. Clerk and Hoskins.

Action of Debt; Defendant pleaded it was for Performance of Covenants, and that he hath performed all, not shewing forth the Indenture. To which the Plaintiff demurred, as *Syderton versus Nicberton*, and *Day versus Lambert*, expressly he must set forth; which the Court agreed to, and made it as a Rule. 1 Sid. 97. 1 Keb. 380, 415. Lewis and Bull.

*In other Pleadings.*

Deed of Covenant on the Demise of an House: The Count is only *quod fregit*, and *non est factum* is pleaded, and Issue is, *quod non est factum*. Here is no particular Breach assigned, but only he declares generally *quod fregit*, it being a Deed with Covenants (and not an Obligation generally), and a Peine Subsequent on Non performance thereof: But being after a Verdict, as *Rast. Entries* 162. it's well enough, a certain Sum being demanded [in Debt], the

The Want of Want of a Breach is supplied by *Non est factum*, a Breach supplied by *Non est factum*. upon the late Stat. 17 Car. 2. 2 Keb. 754. Bur- nard and Michell. Vide the Case, 1 Vcent. 114, 126. Vide supra Tit. Breach.

Covenant was brought, for that the Defendant did not pay a Rent with which the Land was charged. Defendant replies, he was to enjoy the Land sufficiently saved harmless, and answers not the Breach. *Per Tot. Cur'*, It's an ill Bar, *1 Brownl. 22. Cowling and Drury.*

Covenant to pay Rent.  
Defendant pleads he was to enjoy the Land sufficiently saved harmless.

In Action of Covenant to deliver Iron, Defendant pleads Two Pleas issuable, *viz.* A Delivery of the Iron according to his Covenant; and by the Third Plea he pleads a Concord. Upon this the Plaintiff demurs generally, *Et dicit quod placitum prædict' est minus sufficien'*, &c. *Per Cur'*, This is a Discontinuance of all the Matter; for this Word [*Placitum*] is uncertain to which of the said Three Pleas it shall refer; so as to Two Pleas pleaded the Defendant remains unanswered; and if it shall be taken that this Word [*Placitum*] goes to the last Plea only, because the pleading of the Concord is only the Matter doubtful in Law, the other Two Pleas being only issuable, against which it's not to be presumed, that the Plaintiff would tender a Demur, then the Plaintiff not coming to Issue on the other Two Pleas, nothing is done as to them; so the Record is imperfect, and by Consequence a Discontinuance of all the whole Matter. *tel. 65. Middleton and Cheesman.*

Covenant against Assignee of Lessee for Years, and Lessee covenants to build an House upon the Land within the first Ten Years, and that he assigned over his Term. Assignee pleads, the Lessor enter'd, and had Possession for Part of the Ninth Year. *Per Cur'*, He ought to shew that he would not suffer him to build, and then the Covenant had been discharged. *Godb. 69. Baker and Fetwell.*

Entry of the Lessor pleaded not good, to covenant to build an House.

*Warrantia Chartæ* depending, is no Bar in Action of Covenant brought for Eviction;

Fraction

## The Law of Covenants.

Fraction of Covenants, and *Warrentia Chartæ*,  
are of different Natures. *Volv.* 139.

*Scire facias* of a Judgment: Defendant pleads,  
That before the Judgment and Hanging the  
Suit, the Plaintiff covenanted with him by the  
Deed now shewed, that if he obtained Judg-  
ment, and the Defendant on such a Day paid  
him 100*l.* that he would not sue in Exe-  
cution, and the Judgment should be void; and  
pleads he had paid the 100*l.* accordingly, and  
demanded Judgment. Plaintiff demurs, and  
it was adjudged to be no Plea; for he cannot  
make the Defeasance of a Judgment before it  
be given, but his Remedy is only by Writ of  
Covenant upon the Indenture, *Cr. El.* 837.  
*Gage and Shurland.*

Where Reme-  
dy, not by  
Plea, but by  
Action of Co-  
venant.

Of pleading  
affirmative  
Covenants,  
negative Co-  
venants.  
Covenants in  
the Disjun-  
ctive.

On a Devise,  
Plea that he  
entered *virtute Legatio-*  
*nis*, and faith  
not the Exe-  
cutor of *A.*  
assented to  
the Legacy.

If a Man be bound to perform all the  
Covenants in an Indenture, if all are in the Af-  
firmative, he may plead Performance of all ge-  
nerally, but if any be in the Negative, he ought  
to plead to them specially, and to the rest gene-  
rally; so if any of them are in the Disjunctive,  
he may shew which of them he had perform'd,  
and if any are to be done on Record, he ought  
to shew it specially. *Doctor Plot* 58. 1 *Inft.*  
303. b. *Vide Tit.* Covenants Conjunctive and  
Disjunctive, and Covenants Affirmative and Ne-  
gative. *Vide Tit.* Bonds to perform Covenants,  
Pleading.

I lease to *A.* for Years rendring Rent, *A.* de-  
viseth his Term to *B.* who assigns it to *C.* and  
I bring Action of Covenant against *C.* decla-  
ring that *B.* entered *virtute Legationis*, not say-  
ing that the Executor of *A.* assented to the Le-  
gacy: Yet this was adjudged good, a Verdict  
being against the Defendant, for it shall be in-  
tended after Verdict; but it had been bad if he  
had demurred to the Declaration. *Cr. Car.* 222.

De-

Declares, That the Plaintiff covenanted to go with a Ship to *D.* in *Ireland*, and to take 280 Men of the Defendant's, and bring them to *Jamaica*; and the Defendant covenanted to Plea which have the 280 Men there ready, and to pay for answers but the Passage of them 5*l.* a Man; and saith, the to Part only. Defendant had not the 280 Men ready, but that he had 180, and he took them and carried them, and the Defendant had not paid for them. Defendant pleads he had the 280 Men ready, and tendered them to the Plaintiff, and that he would not receive them; but saith not any Thing to the Carriage of the 180 Men, nor to the Non-payment for them; and because it was not a Plea to the whole, Judgment *pro Quer'.* 1 *Lev.* 16, 17. *Tompson* and *Neel.*

A latter Covenant by a second Indenture cannot be pleaded in Bar to the former; but the Defendant must bring his Action on the last Indenture. 2 *Vent.* 218.

Debt on Bond to perform Covenants in a Lease: Defendant covenants that he would not deliver the Possession to any but the Lessor, or to such Persons that should lawfully evict him. Defendant pleads, That he did not deliver the Possession to any but such who lawfully evicted him. Plaintiff demurs: It was objected that the Plea was a Negative Pregnant; he ought to have said, Such a one lawfully evicted him, to whom he delivered the Possession; or that he did not deliver the Possession to any. But the Defendant said, The Plaintiff had not assigned any Breach, and so cannot have Judgment; for he ought to have replied, and assigned a Breach. Against which it was said, He having pleaded an ill Plea, had necessitated the Plaintiff to put himself upon the Judgment of the Court upon the

Negative  
Pregnant.

Plea good,  
pursuant to  
the Words of  
the Covenant,  
and the Plain-  
tiff in his Re-  
sponse to  
assign a  
Breach.

the Plea, *Yelv. 78, 152, 153. Per Cur'*, The Plea is good, pursuant to the Words of the Covenant being in the Negative; and that the Plaintiff ought to have replied, and assigned a Breach, which he having not done, cannot have Judgment. *1 Lev. 83. Pullen and Nichols.*

Covenant upon a Conveyance of Lands, where the Vendor covenants, that he was seised in Fee; and assigns for Breach, that he was not seized in Fee, and so *non tenuit conventionem suam*. Defendant pleads, *non infregit conventionem suam*; and upon Issue joined, Verdict pro Quer'. It was moved in Arrest of Judgment, that this Issue on Two Negatives was not any Issue, consisting of Two Negatives only; *scilicet*, that he was not seized in Fee, and *non tenuit conventionem* of the Plaintiff's Part, and *non infregit conventionem* of the Defendant's Part. *Per Cur'*, It is an Issue, though but argumentative and informal; for if he had not broken his Covenant, he was seized in Fee; and if he was not seized in Fee, he had broken his Covenant, and it is not all immaterial; and informal Issues are cured by Verdict, though immaterial Issues are not. *Pit and Russell's Case*.

**Issue argumen-**  
**tative and**  
**informal.**  
  
**Informal Is-**  
**sues cured af-**  
**ter Verdict,**  
**immaterial**  
**not.**

Covenant and Breach assigned in not repairing of Houses, and several other Things. The Defendant pleaded, *Non infregit conventionem*. Plaintiff demurs, The Plea was ill, because no good Issue may be taken upon Two Negatives; also this Way of Pleading is too general, *1 Lev. 183. Walsingham and Comb.*

Action of Covenant is brought for Two Breaches; as to one a good Bar is pleaded, the Plaintiff shall not have Judgment. *Palmer. 110.*

Tender plead-  
ed without  
saying, *Uncore*  
*priſt.*

If *A.* covenant with *B.* to pay to him 10*l.* after Michaelmas, and before Easter, in Debt upon this Covenant; if the Defendant pleads, that within the said Time he tendered to the Plaintiff

## The Law of Covenants.

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Plaintiff the said 10*l.* and he refused it, yet this is not good without saying *Uncore prist.* 2 Rolls Abr. 523. Newton's Case.

In Action of Covenant, that it should be lawful for the Plaintiff to have and enjoy for the Term of Nine Years; and that he might enjoy from 1664, which was Two Years before the Sealing and Delivery of the Deed. Dyer 240. Defendant pleads, The Plaintiff was not disturbed *ab & post* the sealing of the Deed. Plaintiff demurs. Because no answer is made to the Time past, Judgment *pro Quer'.* 2 Keb. 291. Lewis and Gellion.

Quiet Enjoy-  
ment before  
the Time of  
sealing the  
Deed.

Action of Covenant to pay Money, 30*l.* when it should be raised out of the Estate of Anne D. Plaintiff sets forth, that 100*l.* was raised out of the Estate of Anne D. and that yet he had not paid the 30*l.* Defendant pleads *Non infregit conventionem.* Plaintiff demurs. Per Cur', This no Answer, nor a good Plea, but the raising the 100*l.* must be answered; after Verdict it had been good enough. Judgment *pro Quer'.* 2 Keb. 342. Brightwell and Dewty.

In Covenant the Defendant pleads general Performance. It is no Plea: *Non damnic'* should have been pleaded, or how he had quietly enjoyed. 2 Keb. 77.

Covenant and declares, That the Lessee for Forty Years demiseth to the Defendant for Twenty Years, rendring 16*l. per Ann.* Rent, and that the Defendant covenanted to pay it; Lessor grants the Reversion, and after re-leaseth Covenants to Lessee before Breach. and that after he in the Reversion of Forty Years assigns his Term to the Plaintiff, to whom the Defendant attorns, and assigns a Breach in Nonpayment of 16*l.* for the Rent of one Year due at Lady-Day, 24 Car. 2. Defendant pleads, That before any Rent became due,

## The Law of Covenants.

the Lessor released to him all Covenants. Plaintiff demurs. Term *Mich. Jones and Rainsford*, being only in Court, this Release was good to bar the Action, being before any Breach; But Term *Passch.* being moved again, and the Court being full, Judgment was given for the Plaintiff; for they will intend the Action brought upon the *Reddendum*, which is a Covenant in Law, and runs with the Reversion at Common Law before the Statute H. 8. and passeth by the Grant of the Reversion; so that the Lessor may not release it after Assignment. 2 *Lev. 207. Middlemore and Goodale's Case* is upon a Collateral Covenant. *Harper and Burgh's Case.*

*Debito modo,*  
where ill in  
Pleading.

Action of Covenant to save harmless from Suits and lawful Eviction. Defendant pleads Performance. Plaintiff replied, *J. S.* took out a Writ of *Hab' fac' possessionem* out of *B. R. debito modo Execut'*, and by Virtue thereof enter'd on the Possession of the Plaintiff, and did expel and amove him. Defendant demurs. Judgment pro Defendant; for *debito modo* is ill, and not sufficient without shewing Particulars. As in Debt for Rent, to say, that a *debito modo* demanded, is ill. 1 *Keb. 379. Nickolls and Pullen.*

Where a Covenant in the same Indenture may be pleaded in Bar for Rent. *Vid. 3 Keb. 331. Et supra Tit. Breach.*

C H A P. XLIII.

Pleading. Estoppel.

Baron and Feme make a Lease for Years by Indenture, rendering Rent; and it is covenanted between the Parties; and the Lessee covenants, That he will pay a Couple of Cappons at Christmas to Baron and Feme, and to the Heirs of the Husband, and also will serve them for two Days in every Harvest. The Husband dies, the Wife brought Action of Covenant. The Defendant cannot plead, that the Wife at the Time of the Lease had nothing, but shall be estopped by the Indenture. *1 Roll. Abr. 872. Bruerton and Evans.*

If one lease to me by Indenture the Land of J. S. who is then seised also of the Land; and after I enter upon J. S. who re-enters, upon which I bring a Writ of Covenant: Lessor cannot say I was not in the Land by his Demise, for he is estopped. *1 Roll. Abr. 874. Styles and Herring. Cro. Jac. 73.*

Debt on Bond to perform all Covenants contained in such an Indenture: In Debt upon this Bond, the Defendant may not say, there is not any such Indenture, but he is estopped.

In Debt on Bond, wherein the Condition is to perform all Agreements now set down by J. S. The Defendant may say no Agreement was then set down by J. S. for this comprehends a Generality. *P. 15 Jac. King & Persewall.*

A Demise for six Years, if J. S. so long shall live: Lessor covenants, That he hath Power to demise

demise the Tenements according to the Effect of the Lease, and Breach assigned that he had not Power to assign.

1. He need not to aver that *J. S.* is alive.

2. The Plaintiff need not shew what Person hath Interest or Estate in the Lands, and it's more proper for the Defendant to shew it.  
*Brownl.*

### Departure.

Action of Covenant for not repairing an House. Defendant pleads Performance, and after rejoins, he was ousted by a Stranger. *Per Cur'*, It's a Departure. *I Keb. 662. Paine and Foster.*

Plaintiff declared, That he held the Office of Vice-Chamberlain to the Queen Dowager, and that by Deed produced in Court, he agreed with the Defendant for the Sale of the said Office; but by the said Writing, the Defendant obliged himself that the Plaintiff should have and receive, during the Life of the Plaintiff, divers Pensions and Salaries belonging to the said Office, and that the Defendant should receive no Part of them: And then sets forth, That the Defendant at his Procurement, was admitted into the said Office, and enjoyed it; and that there were six Years in Arrears of a certain Salary belonging to the said Office, due and payable to the Plaintiff according to the Agreement, which the Plaintiff had not received, nor the Defendant paid him: *Licet saepius requisitus*, and so he broke the Covenant. Defendant pleads, That he from the Time of the Agreement, to the Time of the Writ, had permitted the Plaintiff to receive the Profits of the said Office accordingly, *absque hoc*, that the Defendant received any Profits of the said Office. Plaintiff demurs, because

cause the Defendant traversed Matter not alledged ; and *per Cur'*, the Travers was not good : and upon this Agreement the Defendant was not bound to pay the Money grown due for the Profits of the Office, to the Plaintiff ; but was only restrained from meddling with them, and to leave them to be received by the Plaintiff. 2 *Vent.* 79. *Killebrew and Sawyer.*

In Debt on Bond to perform Covenants in Indenture of Lease. Defendant pleads, That before the Original purchased, the Indenture by Assent of the Plaintiff and Defendant, cancelled and avoided, and demands Judgment, *Si adio*. Per Coke, clearly the Plea is not good, without Averment that no Covenant was broken before the cancelling. 2 *Brownl.* 167.

In Covenant for not Repairing, and Breach shewed, that the House was burnt down thro' the Negligence of the Defendant, &c. and that he did not repair it. The Defendant traversed, That it was not burnt down, *prout*. It's an ill Traverse ; for the Defendant's not repairing, is the substantial Part, and the other is but Indurement. 24 *Car. B. R.* *Allen and Reeve.*

Covenant to pay Money on Articles. Defendant pleads Payment after the Day, of 5*l.* in Satisfaction of 50*l.* This is ill Plea ; but it may be pleaded in Satisfaction of a Breach of Covenants. 1 *Keb.* 245.

In Action of Covenant the Defendant cannot plead, that the Plaintiff *tempore quo nihil habuit Nil habuit in Tenementis*, tho' such a Plea in Action of Debt *in Tenementis*, for Rent is good, it cannot be pleaded in Covenant for a Sum in gross. 2 *Vent.* 99. *Clark and Peppis.*

Later Covenant by a second Indenture cannot be pleaded in Bar to the former ; but the Defendant must bring his Action on the last In-

F f denture,

denture, if he will help himself. 2 Vent. 217, 218.

*Monstr. des  
faits.*

Debt on Bond to perform Articles. Defendant pleads Performance. Plaintiff alledged Non-payment to *J. S. secundum formam Articulorum.* Defendant demurs, because the Payment is not alledged to be any Article in the Indenture. *Per Cur'*, The Bar is ill by Performance, not setting forth the Indenture, and the general Replication is good enough without setting forth the Indenture ; and the Defendant might have taken Issue in his Rejoinder, That there was no such Article ; and then the Plaintiff on Demur-rer could have no Judgment : But by alledging a Breach he hath waved the ill Bar, that did not set forth the Indenture. 3 Keb. Lee and Pigfly.

Covenant to render an Account of the Profits of the Lands, what he expended in Reparations being deducted. He pleads, he expended 800*l.* in *& circa reparationem Præmissorum, & alia onera necessaria* ; and shews not what in particular. Ergo, It is ill. 1 Sand. 48. Parker and Thorould.

## C H A P. XLIV.

*What Releases shall be a good Bar of Covenants, or not.*

Covenant from one, and his Heirs and Assignees, for further Assurance with J. S. J. S. conveys these Lands to J. D. J. D. as Assignee, brings an Action for not levying a Fine upon the Plaintiff's Request. Defendant pleads a Release from J. S. dated after the Commencement of the Suit. *Per Cur'*, The Breach being in the Time of the Assignee, and the Action Covenantee brought by him, and so attached in his Person, the Covenantee cannot release this Action, wherein the Assignee is interested; and also tho' the Breach was in the Time of the Assignee, yet if the Release had been by the Covenantee before any Breach, or before any Suit commenced, it had barred the Assignee from bringing this Action. *Cro. Car. 503. Midlemore and Goodale, 1 Roll. Abr. 411.*

Condition for Performance of Covenants: Tho' the Covenants broken be released, yet the Bonds remain under Forfeiture, *Hob. p. 168.* If before the Breach of any of the Covenants, the Obligee releaseth the Covenants, and afterwards one of the Covenants is broken, the Obligation is not forfeited; for there is not now any Covenant which may be broken, and so the Obligation discharged; but if the Release had been made after the Covenant broken, *aliter. 3 Leon.* After Breach, 69.

## The Law of Covenants.

The Plaintiff assigned a Breach in *Non reparando*. The Defendant pleads, The Plaintiff had acquitted and discharged him of all Reparations. Plaintiff demurs. *Per Cur'*, This is an Acquittance and Discharge of the Reparations for the Time past as well as the Time to come, and amounts to as much as if he had released that Covenant ; but the Covenant being broken, that Discharge shall not take away the Action on the Obligation which was once forfeited. 3 Leon. 69.

**Future Covenant, not released by the Marriage of the Covenantor and Co-venantee.**

Covenant was, That if *B.* will be his Wife, and marry him, if *B.* survive him he will give to her 300*l.* *B.* alledges, They were married, and that *A.* died worth so much after his Debts and Legacies paid, and *A.* enters into a Bond to a third Person to pay it. It is apparent that this Debt is not due during the Coverture, but ought to be paid after his Death to the Wife : And *Windham* produced a Record of *Thompson* and *Clarke's* Case, which was adjudged in this Court, as appears by the Roll, *Hill. 17 Jac. Rot. 1155.* The Case was briefly this : A Man promiseth, That in Consideration such a Woman would marry him, to leave to her 500*l.* They are married, and the Husband dies ; and after the Wife makes her Executors, and dies : Executors of the Wife bring Debt against the Administrators of the Husband, alledging he died worth so much, his Debts and Legacies being paid. Defendants demur, and Judgment was *pro Quer'*, That they shall recover the Debt. Which is a stronger Case than the principal Case ; for here was an Obligation to a third Person, but here the Debt was founded upon the Contract. *Glinn C.J.* Covenant \*before the Breach of it, may be released by the Name of Covenant. The Court would not adjudge this Debt

\* Covenant before the Breach of it, may be released by the Name of Covenant.

Debt gone, 2 Sid. 59. The Case of *Smith and Stafford* was cited on the other side. *Hob.* 216. which was, the Testator promised if *A.* woud marry him, and he died before her, to leave her worth 100*l.* and then says, that she married him. Verdict *pro Quer'.* It was moved in Arrest of Judgment, That the Promise was released by the Marriage in Law. Against which it was object-ed, That this Action could not rise during the Coverture, for it was not to be performed till af-ter the Death of him that made the Promise: But however, it is a Promise presently, and the Lieu or binding of the Promise is already in force, and he might have released it before Marriage by the Word *Promise*, but not by the Word *Action*; and what might be released actually, the Mat-riage releaseth. and of that Opinion was *Hobart*: But it was adjudged the Promise was not relea-sed. Vid. *Het. f.* 12.

*When and by what Words a Covenant shall be relea-sed.* Vid. 2 Mod. 281.

If *A.* covenants with *B.* That *C.* shall pay 10*l.* yearly to *D.* *D.* may not release this to *C.* in dis-charge of the Covenant, for that he is a Stran-ger to the Covenant; for when a Man binds *Covenant to* himself that a Thing shall be performed to a *do a Thing to* a Stranger. he hath taken it upon him that the Stranger shall accept it. 2 *Roll. Abr.* 402. *Quick* and *Ludborough*.

This Case is reported in 3 *Bulst.* The Cov-e-nant was, That a Stranger should pay 8*l.* yearly to one of the Covenantees, and to one *Frances* *Joyner* a Stranger. *Frances Joyner* took to Hus-band one *Bucks*, who released this Payment. *Per Cur'*, It is no good Release: It is neither a Debt

## The Law of Covenants.

or Duty in the Party to whom the same is to be paid by the Covenant, and a Release doth not operate but upon an Estate, Interest or Right, none of which is here: In this Case a Diversity was taken between where a Man is Party to a Covenant or Condition, and where he is a Stranger: If he be a Party to whom the Performance is to be made, and he refuseth, it is a good Plea to plead the Refusal. *Aliter* where the same is to be done to a Stranger who refuseth, for it was his Folly to bind himself to do a Thing which he cannot effect. 3 *Bulst.*

A Release of all Demands is no Bar in an Action of Covenant afterwards broken. *Cro. Jac. 487, 170. Field and Hancock.*

*J. N.* doth covenant with *J. S.* by Indenture, By Release of to pay him 40*l.* yearly for 21 Years, and after of all Actions. *J. S.* doth release to *J. N.* all Actions; the whole Covenant is not discharged, only the Arrears; because the Covenant is executory, yearly to be executed during the Term of 21 Years, for he may have several Actions of Covenant for every Time it is behind; for nothing shall be discharged by the Release of all Actions, but that which was in Action, or a Duty at the Time of the Release made. *Rhodes Serjeant*, put a Case which he vouched to be adjudged, 4 *Eliz.* If a Man covenant with *J. S.* That if he will marry his Daughter, that then he will pay him 20*l.* if a Release were made by *J. S.* before the Marriage, the same will not determine the 20*l.* if he marry her afterwards, because it was not a Duty before the Marriage. *Gould. p. 12. 2 Cro. 171.*

What

What shall be said a good Release of Covenants,  
or not.

The Testator of *S.* covenants with the Plaintiff, Not to intermeddle, sue or molest the Plaintiff, or demand any Account of *G.* Father of *Mary* Wife of the Testator *Sterling*, who had devised all his Personal Estate to the Plaintiff in Trust for the Use of the Wife; and assigns for Breach, That *Sterling* in his Life-time, in the Name of him and the said *Mary* his Wife, had sued the Plaintiff in the Exchequer-Chamber by English Bill, touching the said Personal Estate, and had caused him to expend 300*l.* Defendant pleads a Release made after the Death of *Sterling* to himself, by himself and the said *G.* and the said *Mary*, then his Wife, of all their Right, Title and Demand in all the Brewing-Vessels, and all the Personal Estate of the said *Sterling*, according to the Custom of London, or otherwise. Plaintiff demurs generally: And per Cur' This Release shall not bar the Action of the Plaintiff; for this extends only to Goods in Specie, claimable by the Plaintiff, and other the Releasors, and not to the whole Covenant of *S.* and this was the apparent Intent of the Parties.

Sir Tho. Jones 104. *Morris against Wilford*, Executor of *Sterling*; but this Case is more fully reported in *Lewinz*.

*Morris* brought an Action of Covenant against *W.* Executor of *S.* declaring, That *S.* by Deed covenanted with *M.* the Plaintiff, not to sue or molest *M.* touching the Estate of *G.* Father of the Wife of *S.* who had devised all his Personal Estate to *M.* the Plaintiff, in Trust for the Wife of *S.* and assigned the Breach, That after such

Release where  
it extends not  
to the whole  
Covenant.

Covenant, *S.* in his Life time, in the Names of him and his said Wife, sued *M.* now Plaintiff, in the Exchequer by English Bill, touching that Personal Estate, and caused *M.* to expend in that Suit 300*l.* The Defendant pleaded, That after the Death of *S.* (the Defendant's Testator) *M.* now Plaintiff, and *Mary* late Wife of *S.* and Daughter of *G.* by their Deed released to the now Defendant, all their Right, Title and Demand in the Brewhouse, released to the Defendant, *totum eorum jus titulum, clameans & demand' al' Brewhouse of S. and to all the Brewing-Vessels, and all their Claim and Demand to the Personal Estate of S. virtute consuetud' Civitatis London' vel alit' quocunq; modo.* Plaintiff demurs. *Per Cur'*, This Release is not any Bar in this Case by the general Words; and being made to particular Purposes, the particular Purposes shall guide the general Words, and extends not to foreign Matter, (*videlicet*) Damages to be recovered for Breach of Covenant with the Plaintiff, altho' he be Executor of *S.* 2. Release of all Demands to the Personal Estate of *S.* will not bar *M.* the Plaintiff, because at the Time of the Release he had no Right to demand any Part of the Personal Estate, but only to have Action against the Person. 2 *Lewin* 214. *Morris and Wilford.*

3. If the Obligee covenant with the Obligor, Covenant not who is bound to perform Covenants not to motto sue before such a Day or sue him before such a Day: This is not any Suspension of the Debt; for the proper Sense of the Words is, to have Covenant upon it not a Release if he sue before the Day, and not to make it a Release. 1 *Roll. Abr.* 939. *Dowise and Jeffreys. Jones* 104.

Articles were made between Commoners, how many Beasts each were to put in, and the Plaintiff and Defendant were two. Covenant brought against the Defendant for putting in more Beasts. Defendant pleads a general Release, and amongst other Things of Obligations, & obligatoria scripta. Now tho' the Word Obligatoria extend ex vi termini, to any Writings under Seal: But per Cur*r*, this Release extends not to discharge the Covenant. Ray. 392. Cart-lidge.

Covenant to three, who had bought an Ad-vowson; That it is free from Incumbrances. One releaseth to the other two: Quer', If they two can bring Action of Covenant without naming the third Person that released? Per Rolls, They may, for after this Release it is as a Bargain and Sale to them two only; and in Action brought against them two, they may plead a Feoffment made to them two only, without naming the third, who released. Marsh. 176. Hayward's Case, 6 Rep. 79.

In mutual Promises, the Plaintiff agrees to release his Equity of Redemption in two Closes: In Consideration whereof, the Defendant assumes to pay 7*l.* to the Plaintiff. He releaseth the Equity of Redemption by Deed, and at the End of the Deed makes a general Release upon Action brought for the 7*l.* Defendant pleads this Release. Per Cur*r*, The Release shall not be a Discharge of the Duty, which was created by it: So Potter and Philips, Pal. 218. 2 Cro. 627. The Defendant in Consideration that the Plaintiff would allow to the Defendant 7*l.* Rent due to him upon Demise, and would make a Letter of Attorney to him to sue a Bond made to the Plaintiff, and that he will release to the Defendant

Release of  
Obligatoria  
scripta, to  
what it ex-  
tends.

Release not to  
discharge a  
Duty created  
by it.

## The Law of Covenants.

dant all Actions and Demands ; the Defendant promised to the Plaintiff, That if he did not receive the said Debt, that he would pay it to the Plaintiff, and then he avers Performance particularly of his Part. After Verdict *pro Quer'*, it was moved in Arrest of Judgment, that by the Release the Promise was discharged. *Curia contra*, Because the Release is Part of the Consideration which induced the Promise ; and also, the Promise is to do a future Act, which may not be released by a Release of all Actions and Demands. *Lut. 249.*

Covenant not to sue an Obligation before *Michaelmas* : This is no Release, nor to be pleaded in Bar ; but only a Covenant, and the Party put to his Covenant if he be sued in the *interim*, as was adjudged in *Deux and Jeffrey's Case*, *Mich. 36 & 37 El. B. C.* for it was not the Intent of the Parties to make this a Release, *21 H. 7. 27.* but a Covenant not to sue me *omnino*, peradventure goes to a Release, and may be pleaded in Bar as the Judges said in the Case *aforesaid*.

## C H A P. XLV.

*Where to be tried.*

**B**OND for Performance of Covenants in an Indenture. The Plaintiff assigned the Breach, That the Defendant himself by the same Indenture covenanted, That the said House was discharged of all former Estates and Incumbrances: And further shewed, That the Defendant had made a former Lease of the said House to *A. B.* in the County of Warwick. To which the Defendant said, That, *tempore dimissionis*, he was within Age; and upon Issue, it was tried in the County of Warwick, and good, and need not be tried where the Writ was brought. *4 Leon. 167.*

Tried at the Place where the Incumbrance was made.

In Action of Covenant the Case was, That the Plaintiff was the Apprentice of the Defendant, and the Defendant had covenanted to instruct him in such a Mystery. Which Covenant was in Middlesex, and for not instructing him brought his Action there. Defendant pleads Departure in London out of his Service. Plaintiff demurs. It was prayed, That the Action might not be removed into London, notwithstanding the Breach laid there. The Jurors are bound to find this Matter, tho' in a foreign County. *6 Rep. 47. Per Cur'*, The Action shall not be removed. In this Case ye ought to take a Writ of Enquiry to tax Damages in Middlesex. *2 Sid. 60, 118. Dixon and Williams. 1 Keb. 816.* cited *Vide.*

A transitory Action.

In

## The Law of Covenants.

In Action of Covenant in *London* on Bottom-  
ree : The Defendant pleads, the Ship was cast  
away at *Falmouth*, in a Foreign County : To  
which the Plaintiff demurred, it being a transi-  
tory Action and Plea, as *Dixon* and *Williams's*  
*Cafe supra*, where the Defendant swore his Plea  
of the Departure into *London*, and Judgment  
for the Plaintiff there affirmed in a Writ of Er-  
ror. *Coleman pro* Defendant, by Traverse of the  
same Matter in the Declaration, cannot alter the  
Place : *Contra*, if it be new Matter ; which ac-  
cords with the Count, and ariseth from the Co-  
venant it self. *Sed Curia contra*, and *Dixon's*  
*Cafe* is unanswerable : The old Books are as  
*Coleman* cited, 1 *Keb.* 816. *Collins* and *Sanders*.  
Covenant was brought against the Mayor,  
Burgesses and Corporation of *Berwick*, upon a  
Lease. The Defendants demised to the Plain-  
tiff an House in *Berwick*, with a Covenant, That  
the Plaintiff should enjoy without Interrup-  
tion, &c. and one *J. S.* a Stranger, entered up-  
on him. The Defendants plead a Local Plea,  
(viz.) That the said *J. S.* did not enter upon  
the Premisses, and a *Venue* to the next County.  
This Issue ought to be tried where the Action is  
laid. *Vid. Dowdale's Cafe.* If Action be brought  
upon a Matter done out of the Kingdom, it is to  
be tried where the Action is laid, and *Berwick* is  
out of the Kingdom. *Vid. 12 Eliz. Roll. 650.*  
and *Roll. 97. 1 Mod. 37. Cusp's Cafe.*

*Tryal,*

## Tryal. Issue. Verdict.

In Action of Covenant, if the Plaintiff count, That upon a Bargain for certain Lands between the Plaintiff and Defendant, the Defendant covenants, That if there were not so many Acres upon the Measure as the Defendant had said to the Plaintiff upon the Sale when the Land was sold, that he would repay for every Acre that should be wanting of the Number 11*l.* and alledgeth, That upon the Measure so many Acres in certain were wanting, which amounts, according to 11*l.* the Acre, to 700*l.* and the Issue was, whether they were wanting, &c. And the Jury found for the Plaintiff, and gave 400*l.* Damages. This Issue is well found for the Plaintiff; for altho' it be found that by this so many Acres are wanting, yet they are Chancellors, and may give so much Damages as the Case requires in Equity, in as much as all is to be given in Damages. 2 Roll. Abr. 703. Sir Baptist Hicks and Goates.

Note, That the *Venue* is not changeable in Covenant.

Where the Jury are Chancellors, and may give so much Damages as the Case requires in Equity.

Covenant against an Apprentice upon his Indenture, for speaking Words, *ad damnum Magistri*. Defendant moved to change the *Venue*, for the Matter of the Action is Words; for which, Action on the Case should be brought, and this Action is brought only for the Plaintiff to elect his County for the Trial, and to oust the Defendant of the Privilege to change the *Venue*: But the Court would not change it. 1 Levinz 307. Taylor and Berkett.

Action

## The Law of Covenants.

Action of Covenant is laid in *London*, and Issue is upon a Feoffment of Lands in *Oxfordshire*. It was tried at *London*, where the Action was laid; and Feoffment of Lands in *Oxon* is local, and ought to be tried there: But by *Vaugban, & tot' Cur.* it is cured by the Statute *Jeofailes, 17 Car. 2.* by the express Words of it, being tried in the County where the Action was brought, *Vide 2 Lev. 165. Adderly and Wise.*

Where Trial  
should be lo-  
cal, and is not  
laid so, it's  
cured by Sta-  
tute 17 Car.  
2.

Covenant in  
*Southampton*,  
Release plead-  
ed in *Sussex*.  
*Replie'* it was  
made by  
Ideot.

*Sic infregit.*

*Sic non tenuit  
conventionem.*

A Man brought Covenant in *Southampton*, and declares upon a Covenant made there: The Defendant pleads a Release in *Sussex*. *Replie'*, That he that made the Release was an Ideot, upon which the Issue is. This shall be tried where the Release is pleaded, and not where the Action is brought, *Dier 112.*

In Covenant on a Bill of Sale, That the Defendant was legal Proprietor of Wooll sold, and had Power. Plaintiff alledgedeth a Breach, that he was not Proprietor, *Et sic infregit con-  
ventionem*, and saith not, *Et sic non tenuit con-  
ventionem*. Defendant pleads, *Tenuit convent'.* Plaintiff demurs. *Per Cur'*, The Breach is sufficient, and the *Sic infregit* is but Form. *3 Keb. 396. Streeting and Hind.*

Issue on Two  
Negatives.

Issue argu-  
mentative and  
informal.

Conveyant upon a Conveyance o' Lands; where the Vendor covenants, that he was seised in Fee; and assigns for Breach, that he was not seised in Fee, *Et sic non tenuit con-  
ventionem suam*. Defendant pleads, *Non infregit con-  
ventionem suam*; and upon Issue joined, Ver-  
dict pro Quer'. It was moved in Arrest of Judg-  
ment, that this was not any Issue, consisting of  
Two Negatives only; *scilicet*, That he was not  
seised in Fee, & non tenuit conventionem of the  
Plaintiff's Part, & non infregit conventionem of  
the Defendant's Part. *Per Cur'*, It is an Issue, tho'  
argumentative and informal; for if he had  
not

not broken his Covenant, he was seised in Fee; and if he was not seised in Fee, he had broke his Covenant, and it is not all immaterial. Informal Issues are cured by Verdict, though Informal Issues are not. *Pit and Russel's Case.* sues cured after Verdict, Covenant and Breach assigned in not repairing immaterial of Houses, and several other Things. The not. Defendant pleaded, *Non infregit conventionem.* Plaintiff demurs. The Plea was ill, because no good Issue can be taken upon Two Negatives; also this Way of Pleading is too general. 1 *Lev.* 183. *Walsingham and Comb.* Sid. 289. 2 *Keb.* 18. 13. 47.

L. brought Action of Covenant against B. and declares, That the Defendant being possessed of an Advowson in Gross for Term of Years, covenanted that he would not grant nor assign his Interest to any without Offer thereof to the Plaintiff; and assigns for Breach, that he granted the said Advowson and his Term therein over, without offering it to the Plaintiff: And Issue joined on *non concessit*, and found by Verdict *quod concessit*, and Damages 50 l. It was moved in Arrest of Judgment, that it is not alledged that the Grant on which the Issue is joined was by Deed, and then no Breach is assigned. But that was averred by the Verdict, and it shall be intended upon the Evidence, that a Deed was shewed, as upon Issue joined on a Grant of a Reversion, where it was not alledged it was by Deed, or that the Tenant attorned; yet if it be found, it shall be good. *Hurt* 54. *Lightfoot and Brightman.*

Breach, that he granted the Advowson, and saith not by Deed, it may be averred by the Verdict, and intended upon the Evidence, that a Deed was shewed.

## Issue. Trial.

Several Pleas  
for every se-  
veral Point ;  
he shall put  
himself upon  
the Country,  
in what Case.

Covenant : The Plaintiff let to the Defendant certain Tythes, and the Defendant render'd Rent, and enter'd into Bond for Security. The Defendant for Part, pleaded Payment; and for other Part, Tender, without *Uncore prift*; and for the other Part, that he is ready to make the Obligation. This is not sufficient, but he must do it at his Peril, and Judgment *pro Quer'*. Also for every several Point he should have put himself upon the Country, because the Plaintiff had alledged *non solvit*; but otherwise, Issue should be taken by the Plaintiff. *I Keb. 54. Banbury and Newland.*

Covenant  
founded up-  
on a Writing  
made in Lon-  
don.

Covenant in *London* for not repairing of Hedges, and for not ploughing the Land in the County of *Hertford*; and upon a *nil dicit*, a Writ was awarded to the Sheriff of *London* to enquire of Damages. Damage was found, and the Writ returned. It was moved, that the Writ issued erroneously, because it was not directed to the Sheriff of *Hertford*, where the Land lay, and where the Damages were properly enquirable, *Sed non alloc'*, because the Covenant is founded upon a *Writing* made in *London*. *Cro. 142. Smith and Batten.*

Sir T. G. covenanted with C. that where he is possessed of a Lease of Twenty one Years of certain Lands, that he will assure, convey, and assign the said Lease to N. Bond for Performance. In Debt against Sir T. G. he pleaded the Conditions, and the Performance of them. The Plaintiff *replicando* said, That the Defendant *non assaravit, conveyavit, & transpo-  
suit*, (*Anglice, let over*) the said Lease, upon which they were at Issue. At the Day of *Nisi prius*, it

was moved, that the Issue was misjoined ; for the Defendant pleads as the Covenant it self is, that he had assured, conveyed, and assigned the Lease. The Plaintiff assigned the Breach in this, *Quod non assuravit, conveyavit, & transposuit* [Anglice, set over:] Which Word [Trans. posuit] is not in the Covenant, nor in the Pleading of Performance thereof. Note, The Covenant was, *ut supra*. The Plaintiff assigned the Breach, *Quod non assuravit, conveyavit, & transposuit*, [Anglice, set over;] and the Defendant pleads, *Quod assuravit, conveyavit, & assignavit*, [Anglice, set over.] And the Court was clear of Opinion, That the Issue was not well joined. 2 Leon. 116. Gray and Constable.

The Breach  
is, *Quod non  
assuravit, con-  
veyavit, &  
transposuit.*

Defendant  
pleads, *Quod  
assuravit, con-  
veyavit, &  
assignavit*, If-  
sue not well  
joined.

In Debt on Bond to perform Covenants, Not to take or treat for a new Lease without the Assent of the Plaintiff. Defendant pleads, He took no new Lease *contra formam Indentur*. Plaintiff replies, He did take a new Lease, not said, by or without the Assent of the Plaintiff. Defendant demurs. Per Cur', The *Replicat*<sup>r</sup> is good enough ; had the Covenant been to take no new Lease, and the Plaintiff had assigned a Breach, that he took a new Lease, not saying, [without the Assent of the Plaintiff,] it had been ill, and not aided by saying, *Contra formam Indentur* : But here the Plaintiff is misled by the Defendant, and the Issue is good enough. 3 Keb. 524. Perry and Whisledge.

## Trial.

Covenant was brought for Non-payment of Rent on a Demise of *Allum Mines*. Defendant pleads, That the Plaintiff enclosed the Mines, so that the Defendant could not have Ingress to the Work. And this was tried in *London*, where the Covenant was alledged to be made. Defendant, after Verdict against *Mistrial aided him*, moved in Arrest of Judgment, that this was by Statute 16 & 17 Car. 2. c. 8. *An Act to prevent Arrest of Judgment*. *L. T. Jones Eq. 82. Aynsworth and Chamberlain.*

*Covenant for not repairing, to be tried where the House lie.* Covenant brought in the County of *B.* and Breach assinged in not repairing an House in the County of *H.* This is a Mistrial. *Sid. 157.* The Case was, Action of Covenant was not repairing, brought in *Hampshire*, and Breach assinged for not repairing of an House in *Barkshire*; and Issue was joined upon *Non infregit conventionem*, and Verdict in *Hampshire* for the Plaintiff. And it was moved in Arrest of Judgment, that this was a Mistrial. And of this Opinion was all the Court, (except *Windham*) for they said, That this was a special Issue, upon which nothing may be given in Evidence, but the not Repairing of the House; and this is in *Barkshire*. And though the Privity remains, this Action being brought by them, &c. which are Parties to the Deed, and not Assignees, yet it doth not give to the Plaintiff any Election in this Case, and so it was a Mistrial. *Sid. 157. Gilbert and Martin. 1 Keb. 525, 601. Mesme Case.*

If

If Action be brought upon a Charterparty, A Breach is assigned in a Foreign Kingdom, it shall be tried where the Charterparty is dated. *1 Vent. 58. Crisp and Jackson against the Mayor and Commonalty of Berwick.* *Vide Raym. 173.*

In Covenant against *Wise*, Defendant pleaded a Feoffment of Land in *Oxfordshire*, and the Issue was *non feoffavit*, and afterwards it was tried in *London*. *Per Cur'*, The Statute 17 Car. 2. Statute 17 c. 8. will help it. *1 Vent. 263.* That Statute helps all Mistrials, so as the Trial be in the County where the Action is brought. *Jennings and Hunking.* *Vide Sid. 157.*

Debt on Indenture, wherein were divers Covenants to be performed on the Part of the Defendant. Plaintiff alledgedeth in his Count, Breach of all generally. Defendant pleads, he performed all. Plaintiff replies, and shews one in Specie. The Jury shall be only charged with this Covenant. *Dier 297.*

### *Damages.*

If more be found in the Breach of the Covenant assigned, than was contained in the Covenant it self, and so Damages given for more than ought, it is erroneous. *Stiles Rep. 12.* Damages given for more than ought.

The Breach was assigned in Two Covenants; and it appeared that for one he had no Cause of Action, and for the other a good Cause; and Issue was joined upon both, and found for the Plaintiff in both, and Damages entirely assed. The Plaintiff could not have Judgment. *Cro. El. 685.*

## The Law of Covenants.

Though in Trespass one may be guilty, and the other not, yet in Covenant, Debt, or other Contract which is joint, one may not be convicted without the other; and here by the Verdict for one, Defendant pleads, that the Covenant is performed: It appears, now that the Plaintiff has not any Cause of Action, and therefore shall not have Judgment, as *Tillies* and *Woodie's Case*. Ed. 4. And the Defendant shall have Costs upon the Verdict against the Plaintiff, and no Costs or Damages against the other.

From what Time shall the Grantee of Reversion recover Damages.

A Man made a Lease for Years, and the Lessee covenanted to make Reparations. Lessor granted the Reversion to another, and Lessee for Years made his Wife Executor, and died. *Per Cur'*, The Grantee of the Reversion shall not recover Damages, but from the Time of the Grant, and not for any Time before.

*3 Leon. 51.*

A Covenant with one, his Heirs, and Assigns, for Enjoyment, and this is touching an Estate of Inheritance. *Per Cur'*, The Eviction being of the Testator, he cannot have Heir or Assignee of this Land; but the Damages shall be recovered by the Executor, though not named in the Covenant, for they represent the Person of the Testator. *2 Lev. 26. Lucy and Lexington.*

Damages, where to be recovered by the Executor, and not by the Heir or Assignee.

In Action of Covenant, if the Plaintiff count, that upon a Bargain for certain Lands between the Plaintiff and Defendant, the Defendant covenants, That if there were not so many Acres upon the Measure as the Defendant had affirmed to the Plaintiff upon the Condition, that he would pay for every Acre that was wanting of the Number 11l. and alledges, that upon the Measure so many Acres in

in certain were wanting, which amounted according to the 11*l.* the Acre to 700*l.* And the Issue is, Whether they were wanting? The Jury found for the Plaintiff, and gave Jury may 400*l.* Damages. This Issue is well found *pro* give so much *Quer'.* For although it be found by this, that all the Acres are wanting, yet they are Chancellors, and may give so much Damages as the Case requires in Equity, in as much as all is to be given in Damages. 2*Rolls Abr.* 703. Sir Baptist Hicks and Goats.

The Jury gave less Damages than covenant-ed for. 1*Rolls Rep.* 25, or 257.

### Judgment.

Covenant brought against two, and Judgment by Default against one, and the Issue found for the other, the Plaintiff never shall have Judgment. The Case was; Covenant brought against two upon an Indenture, by which they covenant artificially to erect an House, &c. The one makes Default, by which Judgment is against him; the other pleads, That they two had artificially erected the House: Upon which they are at Issue, and found *pro* *Deft'*. And it was moved for the Plaintiff, notwithstanding this Verdict, to have a Writ of Enquiry against that Defendant, against whom Judgment is given *per* Default; *quia*, here the Act to be done, ought to done by both, and one is condemned of Non-Feasance by the Judgment. But it was held *per Cur'*, That no Writ of Enquiry shall issue, nor shall the other Defendant be charged with any Damages; for it appears by the Verdict, that

## The Law of Covenants.

the Covenant is performed, and the other Defendant shall have Costs against the Plaintiff. *Sid. 76. Boulter and Ford.* And *Windham*, Justice, held in this Case, That if the Defendant had pleaded, that the House was artificially erected, or that it was artificially erected by him (without saying, by them Two): And the Jury found it so accordingly, that this is a good Performance of the Covenant, because the Thing required to be done, is accordingly performed. And therefore there is Difference between this Case, and the Case where two covenant to go to *York*; there one cannot plead that he went, but ought to plead, that they Two went to *York*, because there is a personal Act to be done, and one cannot go to *York* by a Deputy, as he may erect an House. *Sid. ibid.*

This Case Precedent is in *1 Lev. 63.* by the Name of *Porter and Harris.*

Action of Covenant was brought against the Defendant, and the Breach of Covenant alledged to be in the Time of the Executor, and the Judgment was enter'd of the Goods of the Testator. The Breach was for ploughing of Land contrary to Covenant. *1 Brownl. 24. Castilion and Smith*, Executor of *Smith*.

In Covenant, divers Breaches are assigned, and some are well, and some are ill; if the Defendant demur upon the entire Declaration, the Plaintiff shall have Judgment for the Breaches which are well assigned, and be barred for the Residue. *2 Sand. 379.* in *Pinckner's Case.*

Rodly and Cook. I W. & M. B. R.

Defendant brings Error upon a Judgment in  
C. B. in Action of Covenant, and assigns for  
Error, want of an Original. Upon which the  
Plaintiff has a *Certiorari*, and had an Original  
certified, which was that *teneant Conventionem*,  
whereas there was but one Defendant, which  
was held to be Error: But if want of an Ori-  
ginal had not been assigned, the *Curfitor* might  
have mended the Original.

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Gg 4

C H A P.

## C H A P. XLVI.

*What shall be said a good Performance of a Covenant or not. Vide Tit. Intent.*

Performance  
in Substance.

If the Covenant be performed in Substance and Intent, it is good, tho' it differ in Words; as when one covenants to deliver the Testament of the Testator, if he plead he hath delivered *Literis Testamentarius*, it is good.

7 Ed. 43.

Covenant to  
give Licence  
to carry  
Trees, and a  
Stranger di-  
sturbs him.

If a Covenant be to give Licence to the Covenantee to carry Trees, or other Thing which he had bought of him; yet if a Stranger, who hath Right, disturb him, the Covenant is performed, for this extends but to the Person of the Covenantor. 18 Ed. 4. 20. b. Aliter, if the Covenant had been, that he shall have Licence, for this extends to all Strangers, *ibid.*

A Covenant,  
that he shall  
have Licence,  
and the Di-  
versity.

Covenant to  
withdraw a  
Suit; a Dis-  
continuance  
is no Perfor-  
mance.

If a Covenant be to withdraw a Suit, a Discontinuance is no Performance, and it differs in Substance, for a *Retraxit* is a Bar, in another Action a Discontinuance not.

2 Ed. 4. 8.

Lessor covenants with his Lessee for Years, That it shall be lawful for the Lessee peaceably to enjoy the Land; and afterwards the Lessor enters tortiously upon the Lessee, and ousts him. This is a Breach, for the Intent was, that he should enjoy it without the Interruption of the Lessor. 1 Rolls Abr. 427. Cone's Case.

If Lessee of an House covenants not to lease Intent, the Shop, Yard, and other Things pertaining to the House, to one who sold Coals there, and after he lets all the House to one who sold Coals; he hath broken the Covenant, for the Intent ought to be performed, *id. ibid. Boner and Langley.*

The Plaintiff covenants to go with his Ship, with the first fair Wind, a Voyage to Gales. And the Defendant covenants, That if he so do, to pay him at his Return so much for Freight. The Plaintiff alledged, He had been there, and was returned, and the Defendant had not paid him. The Defendant plead-  
ed a Plea, and traversed, *absq; hoc*, that the Plaintiff failed with the first fair Wind. *Per Cur'*, It is an ill Traverse; for the Substance of the Covenant is to perform the Voyage, and the first fair Wind is no material Part of it. *Hard. p. 69. Constable and Clobery cited.*

Substance of  
the Covenant  
not traversed.

If the Condition or Covenant be to assure certain Lands to such a Person as the Obligee or Covenantee shall name, and after he assures this to the Obligee himself; it is a good Performance, though it be not alledged that the Obligee named himself, for this Acceptance is a Nomination of himself. *I Rolls Abr. 424. Hauseye and Wild.*

A Man by Deed indentured, bargained and Where Deed sold Lands to another in Fee, and covenanted by the same Deed to make him a good and sufficient Estate in the said Lands before Christmas next; and afterwards, before Christmas, the Bargainer acknowledged the Deed, and the same is enrolled. *Per rot' Cur'*, By that Act the Covenant is not performed, for he ought to have levied a fine, or to have made a Feoffment, &c. *3 Leon. p. 1.*

Cove-

Covenant to convey Land, it must not only be an absolute, but an effectual Conveyance. it must be an effectual Conveyance so to the Use of *A.* and his Heirs, on Consideration of Money ; if he surrender into the Tenants Hands, he must get it presented, for it must be an effectual Surrender ; as, if a Man be bound to make a Feoffment to me to be upon Request, if I request him to make a Deed of Feoffment with Letter of Attorney to *B.* to make Livery to me, and he doth so, this is a good Inception ; yet if Livery be not made, it is a Forfeiture. *1 Roll. Abr. 425. Shan and Belby.*

An Act co-  
venanted to  
be done, and  
is done, tho'  
afterwards  
dissolved or  
reversed by  
Law-suit.

A Man covenants, That *T. H.* Son and Heir apparent of *J. H.* shall marry *E. L.* before the said *T. H.* and *E. L.* shall attain their several Ages of Fourteen Years, if *E. L.* would consent thereunto. Afterwards *T. H.* married *E. L.* *T. H.* being then Thirteen Years old, and *E. L.* Nine Years, and no more. Afterwards *T. H.* came to Fourteen Years, and disagreed to the said Marriage. All this was pleaded in Bar as a Performance of the Covenant, and good. The Covenantor is bound that *T. H.* shall marry *E. L.* which was executed, but he is not bound to the Continuance of it, that ought to be left to the Law. If I be bound to you, that *J. S.* (who in Truth is but an Infant) shall levy a Fine before such a Day, which is done accordingly, and afterwards the same is reversed by Error, yet the Condition is performed. *1 Leon. 52. Leigh and Hannover.*

A Merchant covenant, that if a Master of a Ship will bring his Freight to such a Port, he would pay him so much, and Part of the Goods were taken by Pirates, and the rest he unladed ; he ought not to pay the Money, be-

because the Agreement was not performed.

1 Brownl. 21. Bright and Cowper.

Performance in a Plea is intended of actual Surrender.  
Performance. Vide 2 Lev. 67.

Agreement to surrender a Copyhold to such a Use. If a Surrender into the Hands of Two Copoholders, according to the Custom, be sufficient Performance. 1 Lev. 293. Beauy and Turner.

C. C. made a Jointure to *Mary* his Wife, and died without Issue, and the Land descended to T. C. his Brother and Heir, who grants an Annuity or Rent-charge of 200*l. per Annum* to Trustees in Trust for *Mary*, and this to be in Discharge of the Jointure. *Hab.* to them, their Heirs, Executors, Administrators, and Assigns, for the said *Mary* for Life; with a Clause of Distress, and a Covenant to pay the 200*l. per Ann.* to the Trustees for the Use of *Mary*. And the Breach assigned was, That the Defendant had not paid it to them to the Use of *Mary*. *Per Cur'*, This Rent-charge is executed by the Statute of Uses by express Words, and though the Power of Distaining <sup>Statute of</sup> Uses is limited to the Trustees by the Deed, yet the Statute transfers the Power to *Mary*, and she may distrain also, and Covenant lies in this Case. 2. The Assignment of the Breach according to the Words of the Covenant is good: And if any Thing be done which amounts to a Performance, they may plead it on the other Side. As the Defendant may plead the Money was paid to *Mary*, which is a Performance in Substance, but it shall not be intended without being pleaded. 2 Mod. 138. 1. Mod. 223.

If *A.* covenant with *B.* before *Easter* next to assure his House to him and *K.* his Wife, during the Life of *J. S.* and *A.* surrenders his House to the Use of *B.* and such as *K.* shall name at the Request of *B.* In this Case the Covenant is broken, for this is no Performance of it.

If Lessee covenant to pay his Rent to the Lessor, and he pays it before the Day, the same is not any Performance of the Covenant; contrary of a Sum in Gros. *1 Leon.* 136.

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C H A P. XLVII.

*Performance.*

*Within what Time, or upon Request.*

D Eclaration, That the Defendant by his Deed, bearing Date, &c. did covenant, That he would do every Act and Acts at his best Endeavour to prove the Will of *J. S.* or otherwise, that he would procure Letters of Admininistration, by which he might convey such a Term lawfully to the Plaintiff, which he had not done, *Licet saepius requisitus.* Defendant pleads, That he came to Dr. *Drury* in the Court of the Arches, and there offered to prove the Will of *J. S.* but because the Wife of *J. S.* would not swear that it was the Will of her Husband, they could not be received to prove it. Plaintiff demurs. *Per Cur'*, Tho' there be no Time limited by the Covenant when the Thing should be done by the Defendant, yet he hath not Time during his Life; but he ought to do it upon Request within convenient Time: But in some Cases, a Man shall have Time during his Life, as where no Benefit shall be to any of the Parties; as if it were to go to *Rome*, and as to the Request, he ought to have shewed it specially with the Place and Time, for it is for the Benefit of the Covenantee; for without Request, the Action doth not lie, and the Bar shall not help the insufficient Declaration. *Per Garwyd,* The bringing the Action is a Request; *Clencb,* A Writ of Debt is a *Præcipe*, for which there,

*Licet*

## The Law of Covenants.

*Licet sepius requisitus,* is sufficient ; but a Writ of Covenant is not so. *1 Leon.* p. 124, 125. *Cater and Booth.*

A Covenant for Payment of Money, and no Time is limited : It is to be paid presently, that is, within convenient Time. So in other Covenants to do transitory Acts, as Delivery of Charters, &c. *Aliter of Local Acts.* 6 Rep. 30. 1 Inst. 208. *Cro. Eliz.* 298. *Pop.* 198.

Covenant to make a *Retraxit of Suit* : He ought to do it in convenient Time. So if it be to acknowledge Satisfaction in such a Court. 1 *Roll. Abr.* 436.

A Covenant to make further Assurance at all Time and Times, and the Covenantee advi-  
seth he shall levy a Fine, he shall have conve-  
nient Time to do it ; for the Words [at all  
Times] shall have a reasonable Construction.  
1 *Roll. Abr.* 441. *Pierpoint and Thimbleby.*

Where by the Covenant a Thing is to be performed upon Demand ; yet he shall have reasonable Time to perform it after the De-  
mand. 15 *Ed. 4.* 30.

Where the Act to be done is of its own Na-  
ture Local, as to make a Feoffment, &c. There  
the Covenantor, no Time being limited, hath  
Time during his Life to perform it, if the Co-  
venantee doth not hasten the same by Request ;  
for this is collateral, and not like to Payment of  
Money. *Cro. El.* 798. *Nose and Bacon* ; yet

**When the A& when the Covenantor may do that that is local  
being to be done, is local.** in the Absence of the Covenantee, as to ac-  
knowledge Satisfaction in the Court of *B. R.*  
there he must do it in convenient Time. 1 *Inst.*  
208. a. 6 *Rep.* 30. b. *Botbe's Case.*

If the Covenant be to pay without limiting any Time, he is not bound to pay before Request. *1 Roll. Abr. 438. Q.*

If the Covenant be to do a Thing upon Request, the Plaintiff must make Request to the Person, and not by Proclamation giving Notice of the Request. *1 Roll. Abr. 443. Gruit and Pizzell.* But a Condition to do such Acts, &c. for the better Assurance, &c. to *B.* that shall be devised by *B.* or his Council, &c. *B.* deviseth a Release, *A.* not being lettered, desires to shew it to Council before he seal it; He shall not be allowed reasonable Time to shew it, he having taken it upon him to do it. *2 Rep. Manser's Case.* *1 Roll. Abr. 440.*

## C H A P. XLVIII.

*Covenants void at Law.*

**D**eclaration was, That the Defendant covenanted for the true Imprisonment of *J. S.* who escaped ; and thereupon the Plaintiff was sued, and forced to pay the Debt. Defendant pleads the Statute of *H. 6.* and that the Covenant was for Ease and Favour of *J. S.* Plaintiff replied, The said Covenant was entered into for better Security, *ab que hoc*, that it was for Ease and Favour. Defendant demurred, and Judgment *pro* Defendant, because there was a Covenant to pay Chamber-Rent, &c. which in it self is for Ease and Favour. *Raym. 222. Mose-dell and Middleton.*

Agreement, That he before *Easter-Term* next following, at the Request of the Plaintiff, would surrender up to the Plaintiff his Letters-Patents of the Stewardship of *Bromsgrove*, to the Intent that he might renew the Letters-Patents in his own Name. The Stewardship of a Court-Leet is within the Statute 5 *Ed. 6. c. 16.* of buying of Offices. 1 *Brownl. 71. Williamson and Barn-sley.*

*Colehill* the Testator had the Office of Surveyor of Customs by Letters-Patents to him and his Deputies ; and by Indenture between him and *Smith* for 600*l.* paid, and 100*l.* per Annum to be paid during the Life of *Colehill*, makes Deputation of the said Office to *Smith* ; and *Colehill* covenants with *Smith*, That if *Colehill* die before him, that then his Executors shall pay

10

to him 300*l.* and Colehill was bound to Smib  
for Performance. *Per Cur'*, The Bond was  
void, as against the Stat. 5 & 6 Ed. 6. of *Buying*  
*of Offices.*

No Lease to be made of any Benefice or Ec-  
clesiastical Promotion, or any Part thereof ;  
and not being impropriated, shall endure any  
longer than while the Lessor shall be ordinarily  
resident, and serving the Cure of such Benefice  
without Absence above 80 Days in any one  
Year ; and all Bonds and Covenants for suffer-  
ing any such Parson to enjoy any such Bene-  
fice with Cure, shall be void. 13 *Eliz. cap. 20.*  
14 *Eliz. c. 12.* either by Parson or Curate ; and  
so the Stat. 13 *Eliz.* of Leases made by Parsons,  
that upon Non-residence for 80 Days, the Lease  
shall be void. This Statute voids Bonds and  
Covenants for Non-residence.

Covenants upon usurious Contracts are also  
void, and Bonds of Covenants upon such Con-  
tracts.

In Action of Covenant on Articles, whereby  
the Parties, 8 *March*, on Loan of 500*l.* for  
Seven Years, from 12 *Novemb.* before paying  
15*l.* half Yearly for Interest, the first Payment  
to be on *Pentecost.* *Vid. infra.*

Debt on Bond to perform Covenants in an  
Indenture, which was to pay Rent. Defendant  
pleads the Stat. 32 *H. 8.* which makes Leases to  
alien Artificers, void. *Sid. 357. Freeman and*  
*King.*

Covenant to do a *Malum in se*, is void ; so a  
*Malum probitum* ; as if one covenant to main-  
tain another in Suits, or that he will appear in  
Inquest, that he will forestall Corn. Tenant in  
Fee simple of Lands covenants, That he will not  
alien it : Covenant that a Tradesman will not  
exercise his Trade, if it be absolute, it's void.

## The Law of Covenants.

Generally where the Matter being in a Condition, will make the Condition void, because it is against Law; there it being in a Covenant, will make the Covenant void.

And yet a Man may restrain himself where the Law doth not restrain him; as Tenant covenants, That he will not cut any Fuel without the Assignment of the Lessor, &c. for in such Cases, *Modus & conventio vincunt Legem.* *Vid. supra,* where and in what Cases Action of Covenant will not lie.

If a Man seised of Lands in Fee, covenants to stand seised of it to such Uses as no Estate will arise by the Covenant; yet it may be good by way of Covenant, and give Remedy to the Covenantee in an Action of Covenant; but wch this Difference: If the Covenant be future, as where one Man doth covenant with another, That in Consideration of a Marriage, his Lands shall descend, remain or revert to his Son and Heir apparent, and to the Heirs of his Body on the Body of his Wife; in this Case the Covenantee may have a Writ of Covenant; for if the Covenant be present, as that a Man and his Heirs shall from henceforth stand and be seised to such and such Uses, and the Uses will not arise; by Law in this Case, no Action of Covenant will lie for the Covenantee in this Case; for un-action of Covenant will not lie, but where it is covenanted that a Thing shall be done hereafter, or hath been done heretofore, and not for a Thing present; as when A. doth covenant with B. That his Black Horse shall be for ever the Horse of B. this is no good Covenant; and albeit he keep the Horse, still B. can have no Remedy. *Pl. 307, 308. 27 H. 8. 16. Finch. Ley 49.*

*Wbm*

*What Covenants are void.*

*Against Law.*

The Sheriff of a County makes *B.* Under-Sheriff, and takes a Covenant of the Under-Sheriff, That he shall not serve Executions above 20*l.* without his Special Warrant. This is a void Covenant, for that it is against Law and Justice; for the Under-Sheriff is liable to execute all Process as well as the Sheriff. *Hb. Norton and Simms.*

If Covenant be to do a Thing *malum in se*, it's void. *1 Inst. 206. b.*

Covenant, That he shall not levy a Fine within 4*H. 7.* or that he shall not suffer a Common Recovery, it's void. *10 Rep. 386. b.*

If one covenant, That he will maintain another in his Suits, or that he will appear in Inquests, or that he will forestall Corn, &c. These are against Law, and void.

If a Man be a Tradesman, and he covenants, That he will not use or exercise his Trade: This Restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his Trade for some Time, or in such a Town only, this is good.

If *A.* owe Money to *B.* and *B.* owe Money to *C.* and *B.* doth make a Letter of Attorney to *C.* to sue *A.* at his own Charge; and *B.* doth covenant with *C.* that he will not release the Debt to *A.* tho' in this Case it be Maintenance in *C.* to sue at his own Charge, yet the Covenant is not against Law.

Debt upon a Bond for Performance of Covenants: Plaintiff assigns a Breach. Defendant demurs. It was an usurious Covenant, and against Law; and a Breach cannot be assigned in omitting the doing of that which is unlawful to be done. *Cro. Jac. 378.*

Covenant to assign to the Covenantee a Commission of Bankrupt, void. So a Bond Street and Daniell; for it's impossible to assign the Commission.

Covenant to go from St. Peter's Church in Westminster, to the Church of St. Peter's in Rome in three Hours; it's impossible. *I Inst. 206. b.*

If a Man covenant to do a certain Thing before a certain Time; altho' it become impossible by the Act of God, yet this shall not excuse him, in as much as he had bound himself precisely to do it. *I Roll. Abr. 450. Q.*

If a Man covenant to leave a Wood in as good Plight as he finds it: If the Trees are thrown down by Tempest, by this the Covenant is not broken, for now it is become impossible by the Act of God, and in this Case the Covenantor is not bound to supply it.

If one covenant to sustain Houses or Sea-Banks, or covenants to leave them in as good Case as he finds them: If the Houses are burnt, or thrown down by Tempest, or the Sea-Banks overthrown by a sudden Flood, the Covenant is not broken by this Accident only; but if the Covenantor do not repair, and make

up

up these Things in convenient Time, the Covenant will be broken. *Perk. Sect. 738. Pl. 227.*  
*5 Rep. 15.*

If in a Deed some Covenants are against Law, and some good: Those which are against Law, are void *ab initio*, and the rest shall stand. *11 Rep. 27. Pigot's Case.*

## C H A P. XLIX.

*What will extinguish, suspend or discharge a Covenant.*

**Discharging of Parcel of the Covenant, not a Discharge of the Residue.** **I**F the Owner of a Ship covenant with *B.* That he will receive such Loading that he shall appoint at *X.* by such a Day, and then to go with the first fair Wind to *R.* and there unload, and take in other Wares; and after *B.* discharges him of the taking in of the Goods at *X.* but that he shall receive his Loading at *R.* This Discharge of Parcel of the Covenant, is not any Discharge of the Residue; *Smith and Barnes*; for these are several. *1 Roll. Abr. 472.*

— By Rasure, Breaking off the Seal, by Rasure of the Date after the Delivery, &c. Covenants may be avoided.

Where the Covenants are several, if the Seal of one of the Covenantors be broken off, yet this shall not avoid the Deed but as to him only. *Aliter*, where the Covenants are joint; there, by the breaking one of the Seals of the Covenantors, all the Covenants are defeated. *5 Rep. 22. Matbowson's Case.*

**By ceasing of the Estate.** If the Estate be created, and a Covenant in Law annexed to it, if the Estate cease, the Covenant shall cease; if express Covenant be annexed, *aliter*. *Vid. 2 Brownl. 162, 163.*

**By Alteration of a Corn-mill into an Horse-mill, Lessor discharged of his Covenant.** The Mayor and Citizens of *London* covenanted to find eight Men to grind every Day in *Bridewell-Mill*, which they let to the Defendant; and agreed, That if they failed therein, the Defendant should retain so much

of

of the Rent out of his Rent: The Defendant pulled down the Corn-Mill, and made it an Horse-Mill, and would now defalk so much out of his Rent as he ought to be allowed for the eight Men. *Per Cur'*, By the Alteration of the Mill in this manner, the Lessors are discharged of their Covenant. *Cro. Jac. 182. City of London against Greyme.*

Lessee covenants to repair. Lessor grants the Reversion to another: Grantee of the Reversion shall not recover Damages but from the Time of the Grant, and not for any Time before: And by *Mamwood*, by the Recovery of the Damages, the Lessee shall be excused ever after for making of Reparations; so as if he suffer the Houses, for want of Reparations, to decay, no Action shall be brought thereupon after for the same, but that the Covenant is extinct. *3 Leon. 51.*

Where by the Recovery of Damages, the Lessee shall be excused ever after for making Reparations, but the Covenant is extinct.

Covenant brought against the Assignee of Lessee for Years. Whereas he made a Lease for Years reserving Rent, &c. Lessee covenanted to build an House upon the Land within the first ten Years, that he assigned over his Term. He brought the Action against the Assignee. Assignee pleads, That the Lessor entered, and had Part of the Possession for Part of the ninth Year. It's not good: That *B.* did enter is too general, and shall be taken strictly against him that pleads it; and it may be that he entered by Wrong, and so it may be he entered by Right, as for Non-payment of Rent, as the Truth was; and if he entered lawfully, then it is no Suspension or Extinguishment of the Covenant; and if the Covenant was suspended, it was only for the Time the Lessor had Possession, and the

Covenant to build. Entry of the Lessor pleaded. Defendant ought to say, That he would not suffer him to build.

Party hath not answered the Time before or after ; and cited a Case, *M. 28 & 29 El. in B. C.* Lessee for five Years covenanted to build a Mill within the Term, and because he had not done it, Lessor brought Action of Covenant. Defendant pleads, That within the last three Years, the Lessor held him out, &c. so as he could not build it. *Per Cur'*, He ought to say, That the Lessor with Force held him out, otherwise it would be no Plea ; and in the principal Case, he ought to have shewed, that he would not suffer him to build. *Godb. 69, 74*. *More 402. Barker's Case.*

*No Act of the Lessee shall discharge himself, or his Executors, of a Special Covenant to pay Rent, of which the Assignee of the Reversion shall have Advantage, per Stat. 32 H. 8. Sir Tho. Jones 144. Ashborn and Mun.*

*Rent, of joy.*

*which the Assignee of the Reversion shall have Advantage.* Lessee covenants to repair the Banks, which by sudden Floods are broken down, under Penalty of 10 l. Lessee is excused of the Penalty, but he must repair in convenient Time. *Dyer 32.*

*S. covenanted jointly and severally with two severally, and afterwards one of the Covenants marries with one of the Coyenantees. Per Mallet, the Covenant is gone. March 103.*

*Covenant by two, artificially to build an House : The one makes Default, and the Issue is found for the other. The first shall be discharged. Sid. 76. Bonker and Ford.*

*Where a Covenant is become impossible to be done by the Act of God ; as where one doth covenant to serve another seven Years, and he die before the seven Years expired :*

*By*

By this the Covenant is discharged. *1 Rep. 98,*  
*Pl. 286.*

By Release. *Vid. Release.*

By Determining the Estate. *Vid. Post.*

If one covenant to leave a Wood in the same Plight he finds it, and he cuts down the Trees, the Covenant is broken presently, for it is now become impossible by his own Act; but if the Trees are blown down with the Wind, the Covenant is not broken, for now it is become impossible by the Act of God, and the Covenantor is not bound to supply it.

If *A.* covenant with *B.* to build an House by a Day, and *B.* doth forbid him, and thereupon he doth forbear to do it; the Covenant is broken, and this will not excuse him: But if he do by an actual Impediment hinder him, or be the Cause why the Thing is not done, then the not doing it is no Breach of Covenant: And therefore if a Lessee covenant to cleanse one of the Ditches in the Lands demised, and the Lessor enters upon the Land it self, and keeps out the Lessee, and he doth not cleanse the Ditch by the Time, by this the Covenant is broken: But if the Lessee doth by Force keep the Lessee out of the Ditch or Place it self, *contra. Trim.* *36 El. B. R. Carrell and Reade.*

Covenantor  
forbids the  
Covenantor  
to perform his  
Covenant.

*What*

*What shall excuse the Performance of a Covenant,  
or not.*

*Act of God.*

A Man covenants to do a Thing which becomes impossible by the Act of God.

If a Man covenant to do a certain Thing before a certain Time, tho' it become impossible by the Act of God; yet this shall not excuse him, for as much as he precisely bound himself to do it. *1 Roll. Abr. 450.*

Covenant to build an House, and the Plague is there.

A Man covenants to deliver Goods at London, and the Boat is over-turned by Tempest; yet this shall not excuse him. *Tompson and Miles, Trin. 32 El. B. R. Q.*

Diversity where the Law creates a Duty; and where the Party by his own Contract makes a Duty.

If a Man covenants to build an House before such a Day, and afterwards the Plague is there before the Day, this shall excuse him from the Breach of the Covenant for not making it before the Day; for the Law will not compel him to venture his Life, but he ought to do it after. *1 Roll. Abr. 450. Lawrence and Preatiman.*

As to this, there is a Diversity: Where the Law creates a Duty or Charge, and the Party is disabled to perform it without any Default in him, and hath no Remedy over, there the Law will excuse him; as in case of Waste, where the House is destroyed by a Tempest: But when the Party by his own Contract or Covenant creates a Duty or Charge upon himself, *aliter*; as if Lessee is bound to repair, tho' it be burnt down by Lightning, he must do it. *Allen 27.*

A Man

A Man covenants, That his Son shall marry the Covenantee's Daughter : If the Daughter refuseth, yet the Covenant is broken ; for the Daughter is a Stranger, and he hath taken it upon him that his Son shall marry her. *Perk. 756.*

In Lease for Years, N. covenants to re-

pair, &c. and to yield up at the End of the

Term : But during that, one B. enters by

elder Title, the Lessee by that is discharged

of the Covenant to yield up all ; if the Land

be gone, the Covenant is discharged. *Noy 75.*

*Andrews and Needham.*

One cove-  
nants, That  
his Son shall  
marry the Co-  
venantee's  
Daughter,  
and she refu-  
seth.

If the Land  
be recovered,  
the Covenant  
to yield up is  
discharged.

*Acts of him that is to have the Advantage.*

If Lessee for Years covenants to convey  
the Water which stands upon the Land, be-  
fore such a Day ; and after the Lessor en-  
ters before the Day, and continues there till  
the Day past ; yet this shall not excuse the  
Performance of the Covenant, for that it is  
collateral to the Land. *Hill. 37 El. B. R.*

*I. Roll. Abr. 453.*

If a Man covenant with me to collect  
my Rents in such a Town, and I interrupt  
him, this shall excuse the Covenant. *H. 37 El.*

*B. R.* Where Inter-  
ruption shall  
excuse.

Declaration, That the Defendant cove-  
nanted to deliver to him 1500 Measures of  
Saltpetre before such a Day, and that he had  
not done it. The Defendant demands Oyer  
of the Deed, in which the Covenant was as  
before : Provided, That if any Mischief  
happen by Fire or Water to disable him, he  
shall be excused ; and pleads he was disabled

Disability,  
by

## The Law of Covenants.

**Variance.**

by Fire: Issue, and 'Verdict pro Quer'. Moved in Arrest of Judgment, That there was a Variance in the Deed, on which he declares; and this produced in Court, for one is absolute, the other conditional: But Judgment was given *pro Quer'*; for he need not declare on more of the Deed than the Covenant, and it is on the Part of the Defendant to shew the *Proviso*, which goes by way of Defeazance of Covenants. *1 Levinz* 88, *Elliot and Blake*.

If the Thing to be performed by the Covenant may not be performed without the Presence of the Covenantee, there his Absence shall excuse the Performance. *1 Roll. Abr.* 457. As if the Covenant be to make a Feoffment to the Obligee.

If a Man be bound to *B.* that *J. S.* shall marry *Jane E.* before such a Day, and before the Day *B.* marries her himself: Hereby the Covenant is discharged. *1 Inst.* 206.

Pyracy no Excuse of Breach of Covenant. *1 Brownl.* 21.

In what Case  
burning  
down by Fire  
shall be an  
Excuse.

If Lessee for Years of an House covenant to repair, and to leave it in as good Plight as he found it, and after certain Sparks of Fire come out of the Chimney of the Lessor into this House near adjoining, by which the Lessee's House is burnt down; this shall excuse the Performance of the Covenant, so that he is not bound to re-edifie it, because it came by the Act of the Lessor himself. *1 Roll. Abr.* 454.

Cove-

Covenant to enfeoff the Covenantee before such a Day ; and after and before the Day the Covenantee disseiseth the Covenantor, and keeps it with Force and Arms till after the Day, so that the Covenantor cannot enter ; this shall excuse the Performance. 8 Rep. 92. *Frances's Case.*

If Lessee for Years covenant to relinquish Part of the Land at the End of the Term, fallowed and fit for Wheat, *Proviso*, the Lessee upon such Warning may surrender and depart at any Feast of *Michaelmas*, at any Time within the Term performing the Covenants ; if he after Warning surrender, and doth not leave the Land fallowed, he hath forfeited his Covenant, for the Acceptance of this Surrender doth not dispence with the Covenant, in as much as by the Covenant he is to accept it. *Moyle and Austen.*

i Roll. Abr. 455.

Covenant not to assign without the Lessor's Consent, is not discharged by the Lessor's Entry into Part of the Land. *Stiles*, p. 265. *Collins and Silly.* It being a Collateral Covenant.

Acceptance of a Surrender does not dispence with the Covenant.

Collateral Covenant.

A Condition recited, That the Defendant served the Plaintiff as a Brewer's Clerk, and that if he performed such Covenants, &c. Defendant pleads, *Performavit omnia*. Plaintiff replies, That one of the Covenants was to give the Plaintiff a true Account of all such Monies as the Defendant should receive when requested ; and alledgedeth, that 30*l.* came to his Hands, and he requested, and he refused. Defendant rejoins, confessing the Receipt, saith, That before the Request made

## The Law of Covenants.

Excuse that  
he was rob-  
bed.

made by the Plaintiff, he laid it up in the Plaintiff's Ware-house, and that certain Malefactors (to the Defendant unknown) stole it away, *Et hoc prædict'*, &c. Plaintiff demurs generally :

1. Because it is a Departure, it's rather an Excuse than Account.
2. He ought not to have averred his Plea, but concluded to the Country ; for the Plaintiff in his Replication alledgedeth ~~30l.~~ the Defendant gave no Account, and the Defendant in his Rejoinder sets forth, he did give Account. There was an Issue ;

But both were over-ruled :

**Departure.**

**Conclusion of  
a Plea.**

1. It is no Departure, but a Fortification of the Bar ; for shewing that he was robbed, is giving an Account.
2. The Conclusion is proper, because the Defendant alledgedeth new Matter, and therefore ought to give the Plaintiff Liberty to come in with a Sur-rejoinder, and answer to it ; for he doth not say, he gave an Account, but sets forth the special Matter how. *1 Vent. 121. Verte Smith.*

A Covenant of a Charterparty for the Freight of a Ship. Defendant pleads, That the Ship was loaden with *French Goods*, prohibited by Law to be imported. Upon Demurerr, Judgment was given *pro Quer'*. For *per tot' Cur'*, If the Thing to be done was lawful

lawful at the Time when the Defendant did A Thing  
enter into the Covenant, though it was afterwards prohibited by Act of Parliament,  
yet the Covenant is binding. *Durus Sermo.*  
*3 Mod. 39. Brasen and Deane.*

lawful to be done at the Time of the Covenant, afterwards prohibited.

### Some other good Cases.

*Note,* If the Deed it self, wherein the Covenants are, or the Estate on which the Covenants, as Accessary to the Principal, do depend, is gone and determined, there regularly the Covenants are gone also; and therefore if a Lease for Life or Years be surrendered, whereby the Estate is gone, or a Deed becomes void by Rasure or the like, and there be Covenants in the Deed, hereby the Covenants are gone also; but this Surrender doth not discharge the Breach. *Dyer 28.*  
*5 Rep. 23. 40 Ed. 3. 27. Brook Surrender 47.*  
*Covenants 42.*

*Walker against the Dean and Chapter of Norwich, Trin. 9 Jac. Rot. 1414.* Action of Covenant brought upon an express Covenant in a voidable Lease, and the Question was, If the Covenant be good, the Lease being void? And adjudged, *Trin. 10 Jac.* that the Action lies well, altho' the Lease be void, and *Mape's Case* was cited. *Brownl. I. p. 21.*

If a Lessee covenant for him, and his Assigns, to build an House upon the Land demised within 7 Years, and the Lessee assign it over; in this Case the Assignee is chargeable, *5 Rep. 17.* But if a Man covenant for him and his Assigns, to make a Feoffment, Obligation, or the like; in this Case the Assignee

signee shall not be charged, albeit he be named.

Lessee covenanted, That he would repair the House with convenient, tenantable and necessary Reparations. Lessor brings Covenant, and alledgedeth a Breach for not repairing for Want of Tiles, and Dawbing with Morter; and did not shew, that it was not tenantable. The Opinion of the Court was, That he ought to have shewed it; for the House may want small Reparations, as a Tile or two, and a little Morter, and yet have convenient, tenantable and necessary Reparations.

*March 17. Conisby's Case.*

If I covenant, That a Man shall enjoy such Land until or *ad* the 15th of April, the 15th Day shall be taken exclusive.

## C H A P. L.

*Covenants determining with the Estate, or of standing Covenants after the Estate determined.*

**I**T is commonly said in our Books, that Covenants in a void Deed are void ; in *Sopran and Skurri's Case*, *Nelv. 18.* The Declaration doth not express that *Z.* did demise the House, and if there be no Demise, there is no Term ; and the Indenture was sealed on the Part of the Lessee, and not on the Part of the Lessor, (for any Thing that appears) : And if Lessee seals his Part, and not the Lessor, *nihil operatur*, neither in respect of the Interest, nor in respect of the Covenants, for the Covenants depend upon the Lease, and the Bond on the Covenants ; and if the Lease had been made, and after surrendered, all the Covenants and Bonds for the Performance thereof had been void also ; but yet in some Cases, the Acceptance of the Surrender shall not dispense with the Covenant, as *Noy 18. Austin and Moyle, 1 Leon. p. 179. Chenev and Langley. Austin and Moyle's Case* was, *A.* leases by Deed to *M.* for Ten Years, and *M.* covenants at the End of the Term to leave Four Acres of the Land fallowed and ploughed ; and in it also there was a Proviso, That if *M.* dislike his Bargain, that upon a Year's Warning he may \* Acceptance surrender his Estate ; and *M.* surrendered, but of a Surrender left not any fallowed : \* The Acceptance of the Surrender hath not dispens'd with the Covenant, but upon a void Lease the Covenants Ad.

## The Law of Covenants.

nants are void, as in *Capenburst's Case*, 1 *Keb.* 131, 164, 182. Bond for Performance of Covenants, that the Grantee shall quietly enjoy a Term; but the Grant was of so much of the said Term as shall be unexpired at his Death, which, as *Chedington* and *Grosvenor's Case*, 7 *Dier*, is void, and so the Covenants depending thereupon are void also. *Wim-dam* put a Difference, and it was agreed, Where a Deed is void in the Fabrick, there the Covenants on it are void, as when a Freehold is to commence *in futuro*, and where there is only want of Interest in the Party-Grantor; but that Deed is good: Which the Court agreed, if the Intent is, that the Covenant shall go with the Lease, which if void, that falls. Lease of Tenant *pro Life* for Twenty one Years, with Covenant to enjoy during the Term, and Bond according; by his Death the Bond falls. In *Dier*, there was an Opinion, that Debt lay on Bond, notwithstanding a Release of Covenants in an Indenture, to which the Obligation relates; but that *Case* is settled, that the Bond and Covenants to which it relates are but one Assurance, and the one being made void, the other falls: *Vid. Sid.* 307. 2 *Keb.* 116.

**Diversity,**  
where a Deed  
is void in  
the Fabrick,  
and where  
there is only  
want of Inter-  
est in the  
Party-Gran-  
tor.

**Debt lies not**  
on the Bond  
after Release  
of Covenants.

Tenant for Life makes a Lease for Years, Lessee by Indenture grants and sells all his Estate, *Hab' in tam amplius modo & forma*, as he ought to hold it. Lessee for Life dies, he in Reversion enters; Bargainee brought Covenant against the Bargainor, it lies not. Here is no Warranty in Deed or Law, but only an Assignment; and if there were a Warranty, yet the Covenant determines with the Estate; as Tenant in Tail makes a Lease for Years, and dies without Issue, the Covenant

nant doth determine with the Estate, *Cr. El.*  
*157. Lynddale's Case, 1 Anderson 12. Serle's  
Case.*

But let the Lease be good or void, yet Upon Eviction  
when there is an Eviction, Covenant lies, tho' the Lease be  
the Lease be originally void.

Covenants in Law extend to lawful Evictions, and to Estate in Being, and not where an Estate is determined; as Lessee for Life makes a Lease for Years, and dies, Lessee shall not have Action of Covenant, or Covenant in Law, *9 Eliz. Dier. 2 Brownl.*

*163, 164.*

*Capenburft's Case was :*

Debt on Bond conditioned for Performance of Covenants in an Indenture, by which the Defendant's Testator being Lessee for Years of a long Term, assigned so much of the Term as shall be to come at the Time of his Death to the Plaintiff, and covenants that he shall enjoy it; and he makes the Defendant Executor, and dies, and assigns a Breach, that the Defendant after the Death of the Testator ousted him; and after Verdict *pro Quer'*, it was moved in Arrest of Judgment, that the Assignment of so much of the Term as should be to come after his Death was void, and so is the Covenant also; for the Covenant cannot subsist without an Estate, and that the Assignment was void, were cited, *1 Rep. Rector of Chedington's Case, and Gravenar's Case in Dyer, and 2 Cr. Child and Baylie's Case;* and so is the Covenant, *Yelv. 18. Sopranie's Case,* and of that Opinion was the Court: But it was further moved, that then the Obligation is single; for if the Condition refer to a Thing that is not, it is all one as if there were not any Condition,

Obligation  
to perform  
Covenants,  
where there  
are not any,  
the Obliga-  
tion is single.

Obligation to perform Covenants in a void Grant, all void.

and to this the Court inclined ; but afterwards the Covenant and Obligation being both for the Corroboration of a Grant which was void, they are also both void, and the Court gave Judgment *pro Defendant*,  
*I Lev. 45.*

In Covenant the Plaintiff declares, Whereas the Queen by her Letters Patents granted Licence to him, his Deputies and Assigns, to buy *Spanish Wooll*, and to transport it hither &c. He by Indenture granted to the Defendant and to R. N. the said Licence for Eight Years; in Consideration whereof, the Defendant did covenant and grant to pay him 100*l.* every Year at Two Feasts, (*viz.*) the Annunciation, and *Michaelmas*; and further, That every Year at the Feast of the Annunciation, or within Twenty Days after, he would make a new Obligation of 150*l.* for the Payment of the said 100*l.* the next Year, and alledges *in facto*, that the Defendant had not paid him the 50*l.* due to him at *Michaelmas*, 28 E. and that he did not make an Obligation at the Annunciation, &c. and for those Covenants broken he brought the Action. The Defendant pleads, that in

*Proviso*, If he does not pay such Money at such Feasts, the Indenture to be void: Action lies for Covenant broken before the Indenture is void.

the Indenture is contained, *Proviso semper*, that if the Defendant doth not every Year make the Bond at the Feast of the Annunciation, or failed in Payment of the Money at the Day; that then and from thenceforth the said Indenture, and every Clause, Article and Sentence therein, should be void and of none Effect, and shewed that he failed in making the Obligation at the first Day, and so the Indenture is void. Judgment *si actio*. The Action lies, for this Covenant broken before the Indenture became void; but they agreed, that

that for the Covenant for Payment of the Money no Action did lie, because the Indenture was void half a Year before by not making the Obligation, and the Intent of the Party was, that it should be void only to have Benefit of Covenants broken *in futuro*, but for Covenants broken before it was never their Intent, but that the Party should have Advantage of them. But by *Wray*, the Thing that makes the Indenture void is the breaking of the Covenant, so they are both at one Time, and so he hath had all his Bargain and all his Benefit of the Indenture, and so the other Party is at large. Judgment *pro Quer'*. Cr. El. Dr. *Man verius Gee*.

### Pleading.

*Requell* brought Covenant against *Hart*, Parson of *D*. The Case was, That *Hart* let to the Plaintiff Parcel of his Glebe and Tythes for Term of the Life of *Hart*, if he should continue so long Parson, rendring 26*s.* 8*d.* Rent; and covenants by another Deed, that the Lessee shall peaceably and quietly have and enjoy the said Land and Tythes, and covenants likewise that he had not done any A& or Acts, by which the Plaintiff shall be interrupted in the said Lease, where *revers* he had made another Lease before of them to *J. S.* And the Plaintiff being ousted by *J. S.* brought this Action against the Defendant, who pleads the Stat. 13. El. c. 10. That Leases made by Parsons, otherwise than is therein limitted and expressed, shall be void, and he pleads over the Statute of 14 El. c. 11. that Covenants shall be of the same Validity, and not otherwise, as Leases by the same Persons;

## The Law of Covenants.

*Stat. 14 El.*  
explained.

sons ; and in as much as the Lease is void, there being another more ancient Lease *in esse*, so the Covenant shall be also. *Gawdy*; the Statute of 14 Eliz. doth not intend to avoid any Covenants, but such as were made to corroborate Leases made void by *Stat. 13 El.* before, and not to defeat Covenants made upon void Leases by the common Law, *quod nota adjorn'*, *Hill. 37 El. Rot. 161.* in a private Manuscript.

*Moile* brought Action of Covenant against *Austen*; Defendant demurs upon the Count, and the Case was this : Lease for Seven Years to *Austen* by Indenture of Land, who covenants to leave Part of the Land *ad finem dicti Termi* fallowed and sturred, fit for Wheat-Season, *Proviso*, that it shall be lawful for the Lessee at any Time within the said Term, giving Warning to the Lessor at the Feast of St. *Michael*, to depart, &c. and he doth not leave it fallow according to the former Covenant : The Q. was, If the Lessee be bound to leave it fallow or not, when he departs within the Term ? For this Power of Departure upon Warning is limited with this Performing of Covenants, *adjorn' nota per Yelverton and Tanfield*, That the End of the Term of Seven Years, and the End of the Term, are all one, for both refer to the Interest of the Term, and to the Determination, be it by Surrender or otherwise; but if it were at the End of Seven Years, this is not before the Seven Years incur'd without respect to the Term : *Vid. Br. Exposition of Terms, 44. 35 H 8. Vid. Paget's Case, in the Rector of Chedington's Case, Dier. fo. 177.* And after comes *Crook*, who said, that the Plaintiff shall not have this Action: For after

Difference  
between the  
End of a  
Term and  
Expiration of  
Seven Years.

the

the Covenant broken it appears that he had accepted the Surrender of the Term, whereby he is concluded. *Per tot' Cur'*, tho' he had accepted of a Surrender of the Term, yet he may have Covenant broken before ; but Action of Waste he may not have, for he accepts of the Land, which is Parcel of the Thing to be recovered by the Action, for which Judgment was given *pro Quer.* Hill. 4 Jac. B. R. entred, P. 3. Rot. 271. Private Manuscript.

*What Covenants are good in a void Lease.*

*Per Haughton*, in Waller's Case : If the Covenant depend on the Interest of a Lease, as a Covenant to pay Rent is void, if the Lease is void ; but where the Covenant is for a Thing collateral, as a Covenant that the Lessor is Owner at the Time of the Lease, or the that the Lessee shall enjoy it ; these Covenants being collateral to the Lease and Interest, are good, tho' the Lease be void. *Nichols cont'*. Covenant to save the Plaintiff harmless against *T.* in a void Lease, the Lessee is disturbed by *T.* the Covenant is good : For when an Estate is created in which is implied a Covenant in Law, there if the Estate be void, the Covenant is void also ; but when there is an express Covenant in Deed, *aliter*, altho' the Lease be void or voidable ; as if he covenant that the Lessee shall enjoy during the Term, and the Lessee resign, yet is the Covenant good, altho' the Term is gone, *Owen* 136.

Action on  
the Lease of  
a Person lies  
for Covenant  
broken  
before  
his Non-  
residency.

Condition  
broken be-  
fore the Con-  
dition per-  
formed,  
whereby the  
Indenture is  
void.

Where a Parson makes a Lease for Years, in which were divers Covenants, and after he became Non-resident, by which the Indenture became void ; yet he may maintain an Action of Covenant for a Covenant broken before his Non-residency, Cr. El. 244.

Condition to perform Covenants in a Lease ; Defendant pleads Covenants performed, the Plaintiff by Replication shews the Covenants, whereof one was, that he should enjoy such Lands let to him, quietly, &c. and sheweth *in facto*, that the Defendant had disturbed him. Defendant by Rejoinder sheweth, that in the Indenture was a *Proviso*, that if he paid 10 l. the 31 of March, 30 El. that then the said Indenture and all therein contained shall be void, and alledged he paid the 10 l. at the Day ; it was adjudged, that by the Covenant broken before the Condition performed the Bond was forfeit, Cr. El. 244. *Hill and Pilkington.*

Covenant, for that the Defendant 35 El. let to him the Lands for Six Yeats, and covenanted that he should enjoy it without Interruption during the Term, and discharged from Tythes and other Duties : And further covenanted, That if Tythes were demanded and recovered against him during the Term, that he should receive so much in his Hands of the Rent as the Tythes amounted to, and for Breach sheweth, that the Parson 42 El. sued him, for the Tythes of Corn growing there in the Years, 38, 39 Eliz. and so brought this Action, and theretupon it was demurred.

*Per tot' Cur'*, this Suit after the Determination of the Term is a Breach of Covenant, for he did not enjoy it discharged, &c. which is not intended of a real Discharge, for that appears not by the Intent of the Parties, because it is agreed, that if he were sued he should recoup as much Rent in his Hands; but their Meaning was, he should be freed from Suit and Payment of it, and he is as greatly prejudiced by a Suit after the Term, as if he had been sued before the Expiration of the Term: But it was not alledged that the Suit was lawful, or that the Tythes were due; (for he was not bound to discharge him from illegal Suits,) so the Breach was not well assigned, Cr. El. 916. *Lamery and Lovering.*

Obligation for Performance of Covenants upon a Lease void *per Statute Law* is void also; as where the Stat. 32 H. 8. makes void Leaves made of Houses to alien Artificers, Sid. 309. And on Bond to perform Covenants which Way soever, the Lease becomes void, *per Release, Surrender, &c.* the Obligation is void also.

*Covenants to be performed under a Penalty.*

In Debt pro 150 l. Plaintiff declares on a Charterparty, which contained divers mutual Agreements; *Et in performance conventionum predictarum ex parte dicti Magistri ipse obligasset se dicto Mercator in penali summa 150 l. & ad performance conven' predict' ex parte dicti Mercatoris obligasset se dicto Magistro in simili penali summa 150 l.* This Action was brought by the Master of the Ship against the Merchant. The Declaration is insufficient, for when it comes to the Penalty on the Merchant's Part it is only *obligasset se*, omitting *ipse*, or *præd' Mercator obligasset se*, and so it is not expressly declared that the Defendant was bound. But *Ventris contra*, for it is *obligasset se præd' Magistro*, and none but the Merchant can be bound; and had it been *ipse obligasset*, it had been good, and that is understood; but Judgment was given for the Defendant,  
2 Vent. 196.

C H A P.

C H A P. LI.

*Bonds for Performance of Covenants.*

Differences between Action brought on the Covenant, and on the Bond for Performance of Covenants. *Vid. 1 Keb. 371.*

DEBT on Bond for Performance of Covenants ; the Defendant sets forth the Covenants by a *Testatum existit*, it is ill.

In Action of Covenant, the Plaintiff may assign as many Breaches as he will, tho' not in Obligation for Performance ; for in that Case there ought to be a Certainty, and certainly alledged, *Cr. Car. 176. Sims and Smith, 2 Keb. 14. 29.*

Debt on Bond of Covenants ; After Verdict it was moved in Arrest of Judgment, that the Defendant's Plea was, that *præd Ed.* did covenant that *R.* was seised, whereas the Defendant's Name was *Robert* that did covenant ; this Misrecital is not material, because here is a good Affirmative, and the Bond, if this be misrecited, is single. *Contra*, if it had been an Action of Covenant, or when the Indenture by Prayer of the Defendant is entered *in hæc verba, 1 Keb. 126. Sid. p. 49. Pegg and Waters.*

The Plaintiff assigned a Breach in Non-reparations ; Defendant pleads, the Plaintiff had acquitted and discharged him of all Reparations. Plaintiff demurs. *Per Cur,* this is an Acquittance and Discharge of the Reparations

## Covenants to be performed under a Penalty.

In Debt pro 150 l. Plaintiff declares on a Charterparty, which contained divers mutual Agreements; Et in performance conventionum predictarum ex parte dicti Magistri ipse obligasset se dicto Mercator in penali summa 150 l. & ad performance conven' predict' ex parte dicti Mercatoris obligasset se dicto Magistro in simili penali summa 150 l. This Action was brought by the Master of the Ship against the Merchant. The Declaration is insufficient, for when it comes to the Penalty on the Merchant's Part it is only *obligasset se*, omitting *ipse*, or *præd' Mercator obligasset se*, and so it is not expressly declared that the Defendant was bound. But *Ventris contra*, for it is *obligasset se præd' Magistro*, and none but the Merchant can be bound; and had it been *ipse obligasset*, it had been good, and that is understood; but Judgment was given for the Defendant,  
2 Vent. 196.

C H A P.

C H A P. LI.

*Bonds for Performance of Covenants.*

Differences between Action brought on the Covenant, *Vid. 1 Keb.* and on the Bond for Performance of Covenants. *Co-371.*

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The Plaintiff assigned a Breach in Non-reparations ; Defendant pleads, the Plaintiff had acquitted and discharged him of all Reparations. Plaintiff demurs. *Per Cur,* this is an Acquittance and Discharge of the Reparations

## The Law of Covenants.

**Release.**

**Demand of Rent.**

**Demand of Rent.**

**Parole Contract may be pleaded in Discharge of Damages in Covenant, not so in Obligation.**

parations for the Time past as well as the Time to come, and amounts to as much as if he had released that Covenant; but the Covenant being broken, that Discharge shall not take away the Action on the Obligation which was once forfeited, 3 Leon. 69.

In Covenant to pay Rent, and in the Declaration there is not any Demand alledged, and it need not, because the Covenant was to pay such a Sum for Rent expressly; but in the Condition of a Bond to perform Covenants expressed in such a Lease, one of which is for Payment of Rent, in that Case the Bond will not be forfeit without a Demand, 1 Ventr. 259. Norton and Harvey.

If a Bond be with Condition to pay Rent precisely, there the Lessee ought to seek the Lessor, and Tender on the Land will not excuse him; but an Obligation to perform Covenants doth not alter the Nature of the Rent, 2 Brownl. 176. Manly and Jennings, Hob. p. 8. Baker and Spain, but that it ought to be demanded, Cr. Car. 76. Chapman's Case.

Covenant for Repairs, and for not repairing, the Action is brought. Defendant pleads, That after the Decay he made such a Concord that the Plaintiff should have 30s. &c. in Satisfaction, &c. and shews it to be executed. Demurrer, for the Action being grounded upon a Deed, cannot be discharged but by a Deed. But *per Cur'*, the Plea is good, for it is not pleaded in Discharge of the Covenant, but only for the Damages which are demanded by Reason of the Breach, and the Covenant remains. And it is not like to the Case of an Obligation with a Condition, which cannot be discharged by a Contract, for

for there it is a Duty certain, Cr. *Jac.* 99.  
*Alden and Blague.*

Condition was for Performance of all Covenants, Payments, Articles and Agreements, comprised in such a Deed, dated, &c. The Defendant shews, that the Deed was a Deed of Feoffment, wherein was contained, that he for 110 l. had enfeoffed the Plaintiff of such Lands, with a *Proviso*, that if the Defendant paid such a Sum at such a Day the Feoffment should be void, and to re-enter with Covenants to save harmless from Incumbrances, &c. and that he had performed all Bond to perform Covenants extends not to a *Proviso* in a Mortgage, there being no Covenant to pay the Money..  
the Covenants, Articles and Agreements, on his Part to be performed. The Plaintiff assigns a Breach, because he did not pay such a Sum at such a Day, according to the *Proviso*. *Per Cur'*, for as much as there is not any Covenant to pay that Sum, it is a *Proviso* in Advantage of the Feoffor, that if he paid the Money he should have his Land again, and it is in his Election to pay the Money or lose the Land; therefore the Condition of the Bond extends not thereto, but it extends to perform the other Covenants, Cr. *Jac.* 281. *Telv.* 206. *Briscoe and King Knipe*, Vid. *Telv.* but Vid. *hic infra*, 2 *Lev.* 116. contra.

Covenant : Whereas the Defendant reciting that she had an Estate for Life in such customary Lands, covenanted that she would surrender the Estate upon Request, and permit the Plaintiff to enjoy the said Lands, and take the Rents, Issues and Profits of 'em ; and *in facto* assigns for Breach, that she did not suffer him to enjoy the said Lands, but had received the Rents, &c. from the Time of making the Indenture until the Day of the Writ.

Defendant

## The Law of Covenants.

Request.

In Covenant the Plaintiff may assign as many Breaches as he will, but not on Bond of Performance.

Defendant demurs upon the Declaration:  
 1. Because there was not any Request alledged for the Permission, *sed non alloc'*, for the Request extends only to the Surrender, not to the Permission. 2. That he doth not alledge a special Disturbance by Entry, or otherwise. 3. The Breach is too general, in assigning that she received the Rents, Issues and Profits of the Lands, without shewing what, so as it might be issuable, and thereby recover in Damages as much as the Defendant recovered, according as it shall be proved to the Jury. But *per Cur'*, in Covenant he may assign as many Breaches as he will, tho' not in Debt on Obligation for Performance of Covenants, for in that Case there ought to be a Certainty, and certainly alledged, but in a Covenant it may be assigned as general as the Covenant is. Judgment *pro Quer'*. Cr. Car. 176. Syms and Smith. Q. the late Act.

Bonds

## Bonds for Performance of Covenants.

**Note:** The Condition of a Bond was to perform all Covenants generally, which being void, the Bond is single; so if there had been a void Indenture, or no such Indenture.

**i Keb. 130.**

Bonds with Condition for the Performance of Covenants, tho' the Covenants, or some of them, be for the Payment of Money, yet the Assignment of such a Bond to the King shall not be received; and if it be assigned it shall be put out of the Court, for no Bond shall be assigned, *ut supra*, but such as are for Payment of Money; Sir J. Hawkins versus Chapman in *Scac.* 4 Leon. p. 9.

**2 Leon. 55. contra. Vid. hic infra.**

A. and B. are bound in a Bond to perform certain Covenants in an Indenture, whereof one is to pay certain Monies; and C. covenants with A. and B. to save them harmless from all Things contained in the same Indenture, and after the Monies are not paid according to the said Indenture, by which the Bond is forfeited; yet C. is not bound to save them harmless from the Obligation, for this is a collateral Thing to the Indenture,

**i Rol. Abr. 432. Scot and Pope versus Griffin.**

If the Deed be void, then no Covenant in it shall bind; as *Yelv. 18. Sopran's Case.* A. possess'd of a Term for Years, granted so much of his Termas shall be unexpired at the Time of his Death. Grantee assigns, and covenants that the Assignee shall enjoy it against all Persons. The Plaintiff assigns a Breach, and Issue, and Verdict *pro Quer.* This Deed is void for the Uncertainty; but here

Bonds for  
Performance  
of Covenants  
not to be as-  
signed to the  
King.

safe harmless  
from all  
Things con-  
tained in an  
Indenture,  
extends not  
to a Bond for  
Performance.

If there be  
not any Co-  
venant, the  
Obligation is  
single.

*Regula.*

here is a Covenant that stands distinct by it self, and if there be not any Covenant, then the Obligation is single; *Owen* 136. *Waller's Case* there cited, *Raym.* 27. *Capenburgh's Case.*

It is laid down as a Rule in *Siderphin*; Obligation for Performance of Covenants in a Lease, if the Lease become void, be it what Way it will, by Release, Surrender, &c. or by Statute Law, the Bond is void also. *Jevans and Harridge.*

Defendant pays *Oyer* of the Condition, which is for Performance of Covenants in certain Indentures made between the Plaintiff, being High-Sheriff, and his Under-Sheriff, on the Part of the Under-Sheriff to be performed upon *Oyer* of the Condition. The Defendant pleads, That the Indentures between the Plaintiff and the said Under-Sheriff at such a Day and Place, and one Part of them under Seal of the Plaintiff, the Defendant brought into Court, which is entered in *hac verba*: And further, the Defendant pleads, there is not any Covenant contained in the said Indenture on the Part of the Under-Sheriff to be performed. *Eboc, &c.* the Plaintiff prays *Oyer* of the said Indenture, by the Defendant brought into Court, which is entered in *hac verba*; by it, it appeared there are divers Covenants to be performed by the Under-Sheriff, and upon *Oyer* of the said Indenture, the Plaintiff demurs. *Per Cur.* he need not in this Case assign a Breach, as in case of an Award; for upon the *Oyer*, the Indenture is made Parcel of the Plea, and by this it appears judicially to the Court, that he had pleaded a faux Plea, and so the Plaintiff need not shew any

Where a  
Breach need  
not be as-  
signed.

Matter of Fact in his Replication to maintain his Action, as in the Case of an Award, but a Demurrer was most proper for the Plaintiff, 1 Sand. 316. *Smith and Yeomans.*

When Action of Debt is brought on a Bond to perform Covenants in a Deed, and the Defendant cannot plead Covenants performed without the Deed, because the Plaintiff hath the original Deed, and perhaps the Defendant hath not a Counterpart of it : The Court used to grant Imparlements till the Plaintiff bring in the Deed, and upon Evidence, if it be proved that the other Party hath the Deed, we admit Copies to be given in Evidence ; but here the Law requires, that the Deed be produced. You have your Remedy for the Deed at Law, we cannot alter the Law, nor grant Imparlements,

In Debt on  
Bond to per-  
form Co-  
venants, the  
Deed to be  
produced.

3 Mod. 266.

Upon Oyer of the Condition, the Defendant pleads covenants performed generally, without shewing the Indenture I may demur to, 1 Sid. 425. *Tapscot's Case*, 1 Keb. 127. *Walker versus Gibson*, &c.

It is not sufficient to shew the Deed when the Plaintiff replies and prays Oyer, because the Plea of the Defendant ought to be special, if any in the Covenants are in the Negative ; and it appears not to the Court whether the Covenants are Negative or Affirmative, until the Deed be shewed. This has been vexata *Questio*, who should set it forth. And in case the Party who would plead the Deed had it not, he ought to move the Court, and the Court will order that he shall have the Deed, or a Copy of it, Sid. 1. 50, 97. *Lewis against Ball*, and p. 425. *Tapscot's Case*,

If the Party  
who would  
plead the  
Deed had it  
not, the  
Court will or-  
der he shall  
have the Deed  
so or Copy.

## The Law of Covenants.

Oyer.

**The Defendant to deliver a Copy of the Covenants to the Plaintiff.**

**Court may compel the Plaintiff to give a Copy of the Indenture to the Defendant.**

So is 1 Keb. 104. The Defendant cannot now pray Oyer as heretofore, but must plead to the Indenture, and produce it to the Court.

The Court on an Affidavit by the Attorney, that the Bonds are for the Performance of Covenants, will order the Defendant to deliver a Copy of the Covenants to the Plaintiff, that he may reply there are none broken; but not else, but by Consent; 1 Keb. 653. *Paschall and Fekell.*

The Defendant demands Oyer of the Condition, & *ei Legitur*, which was to perform Covenants. The Plaintiff demurs generally, because the Defendant saith not *profert hic in Curia* the Indenture; for as the Plaintiff *profert hic in Curia* the Obligation on which he declares, so the Defendant ought to *profess in Curia* the Indenture which he pleads; for otherwise he may recite it in Pleading, and the Plaintiff may not have Answer or Remedy. This is added by Stat. 27 El. being Master of Form, otherwise had it been upon a special Demurrer. The Entry upon the Roll always supposeth it to be brought into the Court by the Defendant, and the Court may compel the Plaintiff to give a Copy to the Defendant, if he swear he never had any, or that he hath lost it, 1 Sid. 208. 1 Sand. p. 8. 2 Keb. 102. *Jevans and Harridge*: But it is mentioned to be Coke's Opinion in 1 *Rol. Rep. Duport and Wildgoose's Case*. One may take Advantage, if he saith not when he pleads the Indenture, *bis in Curia prolat'* of it upon Demurrer general, without shewing Cause, for it is Matter of Substance.

*Note: In Debt for Performance of Covenants, they must be set out in Latin, Allen, p. 87.*

The

The Defendant pleads, it was on Condition to perform Covenants *bic in Curia prolat'*, and in Truth the Deed was not indented. The Plaintiff had Judgment, *s Rep. 20. b. Stiles's Case, Cr. El. 472. mesme Case.*

If an Obligation to perform Covenants becomes forfeit, hanging the Action, this shall not make the Action good; but Obligation with Condition for Payment of Money becomes payable pending the Action, this has made the Action good, *Sid. 308. in Champion and Skipweth's Case.*

A Duty which is not naturally a Debt, but by Circumstance only a Debt upon a Bond for Performance of Covenants, or to save harmless, may be assigned over to the King for a Debt; but a *Scire fac' shall issue forth, to know if the Party hath any Thing to plead against such Assignment.* *2 Leon. 55. Beaumont's Case, tho' 4 Leon. contra, Vid. hic supra.*

If a Man be bound to perform Covenants, and one Covenant is to pay Legacies, he need not to pay them without a Demand: *Aliter, where one is expressly bound to pay such Legacies,* *2 Leon. 114.*

Condition for Performance of Covenants, whereof some are void by Common Law, yet it shall stand good for the rest agreeable to Law; but where any are void by Statute Law, all is void. If a Sheriff on *Stat. 23 H. 6.* will take a Bond for a Point against that Law, and also for a due Debt, the whole Bond is void, for the Letter of the Statute is so, for a Statute is a strict Law; but the Common Law doth divide according to common Reason, and having made that void that is against Law, lets the rest stand, as

is 14 H. 8. fo. 15. Hob. 14. Sir Daniel Norton versus Simms.

So it was adjudged in *Lee and Colehill's Case, Crok. Eliz. 529.* A Condition for Performance of Covenants; one is against the Statute for buying of Offices, the other is a good Covenant, and not relating to that; the Bond is void in all, for the Statute saith, the Bond to that Purpose shall be void, and it cannot be void to this Intent and good to another. And it hath been adjudged, if a Person makes a Lease which is void by the Statute for Non-residence, and there is an Obligation for Performance of Covenants; altho' there be some Covenants there in which do not concern the Lease, yet the Bond is entirely void, otherwise the Meaning of the Statute should be defrauded by putting in a lawful Covenant within the Indenture, *Vid. Pratt. Reg. 121.*

## C H A P.

## C H A P. LII.

*Bonds for Performance of Covenants. Pleading.*

*Where the Covenants are in the Affirmative or Negative, or in the Disjunctive. Where Performance must be shewn particularly.*

Condition to perform all Covenants comprised in such an Indenture, the Defendant pleads he had performed all Covenants, without shewing how. *Per Cur'*, as to all the Covenants which are to be performed in the Affirmative, the Plea is good; but a Negative Covenant must be answered in the Negative, and where the Plaintiff is to be a Party to the Performance; as if I am bound to enfeoff you of Two Acres in D. which you shall assign, here I must shew how: Also where Words are in the Disjunctive, it ought to be shewed specially.

16 H. 7. 11. a.

If I am bound to perform Covenants, and the Covenants are in the Affirmative, if the Performance of them be by Matter of Fact, I may recite the Condition, and plead generally I have performed all the Covenants, and shall not shew especially the Performance of them: As if I am bound to enfeoff the Obligee of, &c. and also, that I shall give to him an Horse. In Debt brought upon the Obligation, I shall shew the Condition, and say, *Per implevi omnes conventiones*, and shall not shew the especial Matter of the Performance, as that I gave him an Horse

K k 3 at

## The Law of Covenants.

at such a Place, &c. but if the Condition be in the Affirmative, and the Performance of it may be tried by Matter of Record; as if I am bound, I shall be nonsuited in such an Action, there I shall shew the Performance of this especially; but if the Condition be in the Negative, as that I shall not go to *London* before such a Day, I must answer to this in the Negative. 13 H. 7. 19. b. 10 H. 7. 12. b.

If the Defendant pleads generally Performance of Covenants, where some are in the Negative, and some in the Affirmative, and the Plaintiff doth demur generally upon it, without shewing Cause of Demurrer, Judgment shall be given according to the Truth of the Case; for that Default of Pleading is but Matter of Form, and is aided *per Stat. 27 Eliz.* except the Plaintiff for Cause sheweth some are in the Negative, and some in the Affirmative; but if any of the Covenants be in the Disjunctive, so as it is in the Election of the Covenantor to do the one or the other, then it ought to be specially pleaded, and the Performance of it, for otherwise the Court cannot know what Part hath been performed. 1 Leo. 311. *Oglethorpe and Hide.*

It is agreed *per Cur.* in *Mint and Berhell's Case*, when the Matters to be pleaded tend to Infiniteness and Multiplicity, whereby the Rolls should be incumbred with the length thereof, the Law allows of a general Pleading in the Affirmative, and allows of the Rule, That he who pleads in the Affirmative, shall alledge Performance of Covenants generally; and it was said, it hath been resolved by all the Justices of *England*, that in Debt on Obligation to perform the Covenants in an Indenture, it sufficeth to alledge

**Performance  
of Covenants  
generally.**

Per-

Performance generally. One covenant to deliver to the Plaintiff all the Fat and Tallow of all Beasts which he, his Servants, or Assigns, should kill or dress before such a Day. The Defendant pleaded, That upon every Request made to him, he delivered to the Plaintiff all the Fat and Tallow of all Beasts which were killed by him, his Servants, or Assigns, before the said Day, and good. *Cro. Eliz. 749.*

In Debt on Bond for Performance of Covenants; one whereof was, That the Defendant should not deliver up Possession to any but the Lessor, or such Persons as should lawfully recover. Defendant pleads, he did not deliver it, but to such Persons as lawfully recovered it. Plaintiff demurs. The Bar is pursuant to the Count, and lying not only in the Knowledge of the Defendant, but that the Plaintiff may as well have Knowledge of it. On affirmative Covenants, general pleading Performance is sufficient, and so on Negative, *per Twisden*; for it is sufficient for the Defendant to plead an Excuse, and the Plaintiff must assign a Breach to intitle himself. *Windham ad idem.* Negative Covenants may enwrap many Particulars, as to say, He did not cut down my Timber, unless for the making of Barns and Stiles, &c. which *Foster* agreed. Judgment pro Defendant. It was said in this Case, here is no Breach necessary to be assigned by the Plaintiff, the Plea being on particular Covenant, which is like a Release pleaded in Arbitrament. *1 Keb. 380, 413. Nicholas and Pullen.*

In Bond of Covenants the Condition is, If the Defendant and *T.* and their Assigns, perform, &c. and he pleads, That he and *T.* had performed, and saith not [their Assigns],

## The Law of Covenants.

A Bar good  
to common  
Intent.

signs], and may be they had assigned it over. *Per Cur'*, it appeareth not that there is any Assignee, and it shall not be intended, except it be specially shewed, and a Bar is good to a Common Intent. 2. The Condition was, If they perform all the Covenants, Conditions, Agreements, Articles, &c. and when he recited them, he saith not which are all the Covenants, Conditions, Agreements and Clauses, in the Indenture, but leaves out *Articles*. *Per Cur'*, Agreements is all one with Articles; and if many Words contain one Thing in Signification, if he answer to them in Substance, it is good. *Cro. Eliz. 255.*

Departure.

Debt on Bond, Condition to perform Covenants. Defendant pleads the Indenture; which was, to return all the Effects of Goods sent to *Barbadoes*, and that he had performed all the Covenants: The Plaintiff replies, such Goods were sent to *Barbadoes*, whereof he had not returned the Effects. The Defendant rejoins, that he had not any Orders to return the Effects of them. On Demurrer, Judgment *pro Quer'*, for this is a Departure, no Mention of Order being in the Covenants. But by *Hales*, had the Covenant been to return them upon Order, the Plea had been good, and in such Case, *performavit omnia* may be taken, that he had performed all which he ought to perform, not having Order. 2 *Lev. 97. Wood and Kirkham.*

Covenants in the Negative. It was agreed in *Ley and Lutterell's Case*, or *Disjunctive*, ought to be shewed specially performed. *Palm. 70.* when all the Covenants are in the Affirmative, and Matter of Fact, the Performance of all Covenants, without shewing how, shall be good: *Aliter*, where any are in the Negative, or Disjunctive, this ought

to be shewed specially how performed ; and when any Covenant is Matter of Record,<sup>So Matter of Record.</sup> and to be performed, although it be in the Record. Affirmative, yet ought it to be especially shewed how performed, as in the Case of a Plea of a Fine levied, because the Record shall be tried by it self, and its Crédit shall not be examined *per le Pass*; and perhaps the Plaintiff will reply, That all Parcels contained in the Indenture are not comprised in the Fine, or other Plea ; upon which the Fine shall be examined, and there is another Diversity, where the Act ought to be done by the Party, and where by a Stranger ; where between the Parties, if it be in the Affirmative, general Performance is sufficient, but if the Act be to be done by a Stranger, (as a Covenant that J. S. and his Wife shall levy a Fine) this Performance ought to be specially alledged ; the Reason is, because the Obligee is a Stranger to him that ought to do the First Act, therefore the Obligor ought to shew how this Act was done by the Stranger.

Diversity,  
where the  
Act ought to  
be done by  
the Party,  
and whereby  
a Stranger.

Debt on Bond, to perform all Covenants contained in such Indenture. In Debt on this Bond the Defendant cannot say, there is not such Indenture but is estopped ; one need not be so particular of the Breach upon a Covenant, as upon a Bond for Performance, for in a Bond for Performance of Covenants, where there is a Covenant to repair, if it be sued, it's not sufficient to say, that the House is out of Repair, but you must shew how ; but on a Covenant it's enough to say, that it was out of Repair. *Ibid.*

In Debt on Obligation, conditioned to perform Covenants, Payments and Agreements

A good Breach, notwithstanding no actual Eviction of the Possession is set forth.

ments in Indenture of Demise of Lands in Possession of A. for Years : Defendant on Oyer pleads Performance of all Covenants, Payments and Agreements, and so the Bond is void by the Covenant ; to which the Plaintiff replied, That the Defendant had nothing in the Lands, but one A. To which the Defendant demurred. And *per Cur'*, this is a good Breach, notwithstanding no actual Eviction of the Possession is set forth.

2. The pleading Performance of all Payments being only in pursuance of the Covenant, and pleaded as a Defeasance to the Obligation, doth not make the Bond void, nor can the Plaintiff take Issue on Payment, unless so specially pleaded. 3 Keb. 616. *Odingley and England.*

In Debt on Bond, the Condition was to perform Covenants of Payment of Rent, and other Particulars. Defendant pleads Performance generally. Plaintiff demurs, for he should have pleaded Performance to each Particular, or other Plea ; and so wherever Particulars are specified. 2 Keb. 362. *Brown and Talderly.*

*Note*, Action on the Case lies against an Attorney, in Nature of a Disceit, for that the Defendant, being Attorney for J. S. against the Plaintiff, in Debt on Bond of Covenants, without any Warrant, enters an Imparlace without the Condition, whereby they could not plead Performance of Covenants ; upon which, Judgment by *nihil dicit* was given. *Rol. Entr. p. 57.*

In Debt on Bond, conditioned to perform Covenants of Under-Sheriffs, Bayliffs, Part in the Negative, and Part in the Affirmative. The Defendant, as to those in the Negative, plea-

pleaded negatively ; and as to those in the Affirmative, that he had observed them, To which the Plaintiff replies, That the Defendant was not assisting at the Arrest of J. S. To which the Defendant demurred. *Per Cur'*, How performed? The Plea is ill, without shewing how he had <sup>med to be</sup> performed them, and yet the Replication is good to shew a Cause of Action, for the naughty Plea was a Trap that the Plaintiff should have demurred to it, and so no Cause of Action would appear. Judgment *pro Quer'*, 2 Keb. 405. *Clavell* and *Gallee*.

Condition was for Performance of Covenants in a certain Indenture, whereof some were in the Affirmative, and some in the Negative : He pleaded the Indenture, and Performance of all the Covenants therein generally ; and it was thereupon demurred, and without Argument adjudged for the Plaintiff. *Cro. Eliz. 691. Cropwell and Peachby.*

Where an Act is to be done according to a Covenant, he who pleads the Performance ought to plead it specially ; otherwise, where it is a Permittance, then it is as in the Negative ; in which Case *permisit* is a good Plea, and then it shall come on the Plaintiff's Part, to shew how the Defendant *non permisit*. 1 Leon. 136. *Littleton* and *Perne*.

*Note*, The Condition of a Bond for Performance of Covenants in an Indenture doth estop to say, There is no such Indenture ; but it doth not estop to say, There are no Covenants. 1 Mod. 15. *Holloway's Case.* 2 Keb. 564. 1 Sanders 316. *Moor* 420. 2 Cr. what not. 375. *Allen* 52.

Condition to perform Covenants. The Defendant pleads, after the making the Bond,

Bond, and before the Writ, the Indenture was cancelled by the Plaintiff; the Plea is ill, for the Bond might be forfeited: He ought to have pleaded Performance of Covenants till such a Day, which Day the Indenture was cancelled. *1 Brownl. 78. Anonymus.*

Condition to perform Covenants in Indenture, bearing even Date, &c. and there is no Date.

The Condition was, to perform all Covenants comprised within certain Indenture, bearing even Date with the Obligation (and in Truth the Obligation and Indenture were both without Date). *Per Cur'*, they ought to have averred a Date of the Obligation, and averred that the Indenture bore the same Date with the Obligation. *Noy p. 21.*

Upon Oyer of the Condition to perform Covenants, Defendant pleads, That there were not any Covenants in the Indenture. Plaintiff demurred, because if there be not any Covenants, the Obligation is single, and had Judgment. *1 Lev. 3. Huel and Povey.*

*What is confessed by Pleading. Covenants performed.*

Obligation to perform Covenants. The Covenant was, If the Plaintiff pay the Defendant 100*l.* at Michaelmas, that the Defendant would pay him Yearly 10*l.* for his Life, and averred he did not pay him 10*l.* Yearly, but did not mention the Payment of the 100*l.* by him, which was assigned for Error. *Per Cur'*, It's no Error, because the Defendant, by pleading Conditions performed, had confessed the Payment of the 100*l.* to him by the Plaintiff. *Moor 474. Goodwin and Isham.*

*Bonds,*

Bonds, with Conditions to perform Covenants generally, and what shall amount to a Breach or not; and in what Cases a Breach need not be assigned.

If a Man let for Years, rendering Rent payable at *Michaelmas* and *Lady-Day*, on Condition, That if he doth not pay at the said Feasts, or within 14 Days after, then to re-enter; and the Lessee binds himself in an Obligation with Condition to perform the Covenants and Agreements of the said Lease. The Lessee pays not the Rent at the Feast, but within the 14 Days; yet the Condition is forfeited, for that the Condition in the Lease is not Parcel of the Reservation. *1 Rol. Abr. 431. Middleton and Ratcliff.*

Condition in  
the Lease not  
Parcel of the  
Reversion.

A Condition to perform Covenants and Agreements. One was, That the Plaintiff had covenanted with the Defendant, That it should be lawful for the Defendant to cut down Wood for Fire-boot and Hedge-boot, without making Waste, or cutting more than necessary. The Plaintiff assigns a Breach in that Covenant, (which is, in Truth, the Plaintiff's Covenant;) the Exception was, That the Condition ought but to extend unto Covenants to be performed on the Part of the Lessee, *Sed non allocatur*, Agreement of it is the Agreement of the Lessee, though it is the Covenant of the Lessor. *1 Leon. 324. Stevenson's Case.*

If

If a Man lease a Mannor by Indenture, except such a Parcel of Land, and in the Indenture there are divers Covenants to be performed on the Part of the Lessee, and the Lessee binds himself in an Obligation to perform all Covenants and Agreements contained in one Pair of Indentures, and names the said Indentures, and after the Lessee enters into the Lands excepted; this is no Breach of the Condition, for the Land excepted is not leased, and it is as if it had not been named. *1 Rol. Abr. 43.* Dame Rus sel and Guswell. But *Plowden* 67. in *Dove* and *Manningham's Case*. If one make a Lease of a Mannor, excepting a Close, rendering Rent, and the Lessee is bound to perform all Grants, Covenants and Agreements, *Contenta, Expressa, aut Recitata*, in the Indentures. If he disturb the Lessor in the Occupation of the Close excepted, he has forfeited the Obligation; for when he excepts the Close, he is content with it, and that the Lessor shall occupy it; and then this is the Agreement, and the said Words, [*Contenta Expressa, aut Recitata*,] every of them go to the Exception, as well as to the Residue.

The Words  
to perform all  
the Agree-  
ments, *Con-*  
*tentas, Expressa,*  
*aut Recitata,*  
how far it  
extends.

Breach assign-  
ed after the  
Action  
brought, ill.

If a Breach be assigned after the Action brought, it is ill. Defendant demands *Oyn* of the Obligation, and it was for Performance of Covenants. Plaintiff replies, and assigns a Breach for Non-payment of Rent the 20th Day of June, 17 Car. and the Bill was filed *Trin. 17 Car.* which Term ended the 14th Day of June, therefore ill. *Sid. 30<sup>o</sup>* *Kirby Champion's Case.*

Bond of Covenants to perform an Indenture of Demise. The Plaintiff declares, He made a Lease the 28th of *May* to the Defendant; and that *postea, Scil' 27th* of the same Month of *May*, the Defendant broke the Covenant. Demurrer, because the Breach is set forth, and before the Lease began, and so no Cause of Action. But by *Bacon*, where the *Postea* and *Scil'* are repugnant, as here they are, the *Postea* shall be good to signify the Time of the Covenant broken, and the *Scil'* shall be void. *Stiles*, p. 45.

*Anonymous.*

Though in Obligations (put in Suit) for Performance of Covenants, the Breach ought to be more precise and particular than Actions of Covenants, because of the Penalty; yet if what is material, and of the Substance of the Covenant be alledged, it may suffice; as the Covenant was, That the Defendant (a Bayliff) should not let at Large any Prisoner that should be arrested, without Licence of the Plaintiff, and an Under-Gaoler. The Breach was, That the Defendant had let him at Large, at *Westm' sans Licence*, &c. but shews not the Place or Time of the Arrest. *Per Cur'*, he need not, the Escape being the material Part of the Covenant. *Sid. 30. Jenkins and Hancock.*

If the substance of the Covenant be alledged, it may suffice.

If the Breach of the Condition of an Obligation be ill assigned, the Verdict shall never aid this Default. *Sanders 2. 179. Kirby and Hamaker, cited.*

*Note,*

## The Law of Covenants.

Cause of Action must appear.

*Note.* Tho' the Action be well brought upon the Obligation, yet when it appears that the Condition was for Performance of Covenants, there can be no Cause of Action without some Covenant broken, and so shall not have Judgment, though he hath a Verdict. *Hob. 14.* Sir Daniel Norton's Case.

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